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Reports
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REPORT
—OF—
CASES RELATING TO BARBADOS

TO BE FOUND IN THE ENGLISH LAW REPORTS

—AND—

OF CERTAIN CASES
Argued and determined in the Local Courts.

—
SELECTED AND EDITED

—BY—

W HERBERT GREAVES, B.A., (Oxon.) Q.C.,

—AND—

C. P. CLARKE, LL.B. (Cantab.) Barrister-at-Law.

VOL I.

BARBADOS.

PRINTED BY T. E. KING & CO., 143, ROEBUCK STREET, BRIDGETOWN.

1897.

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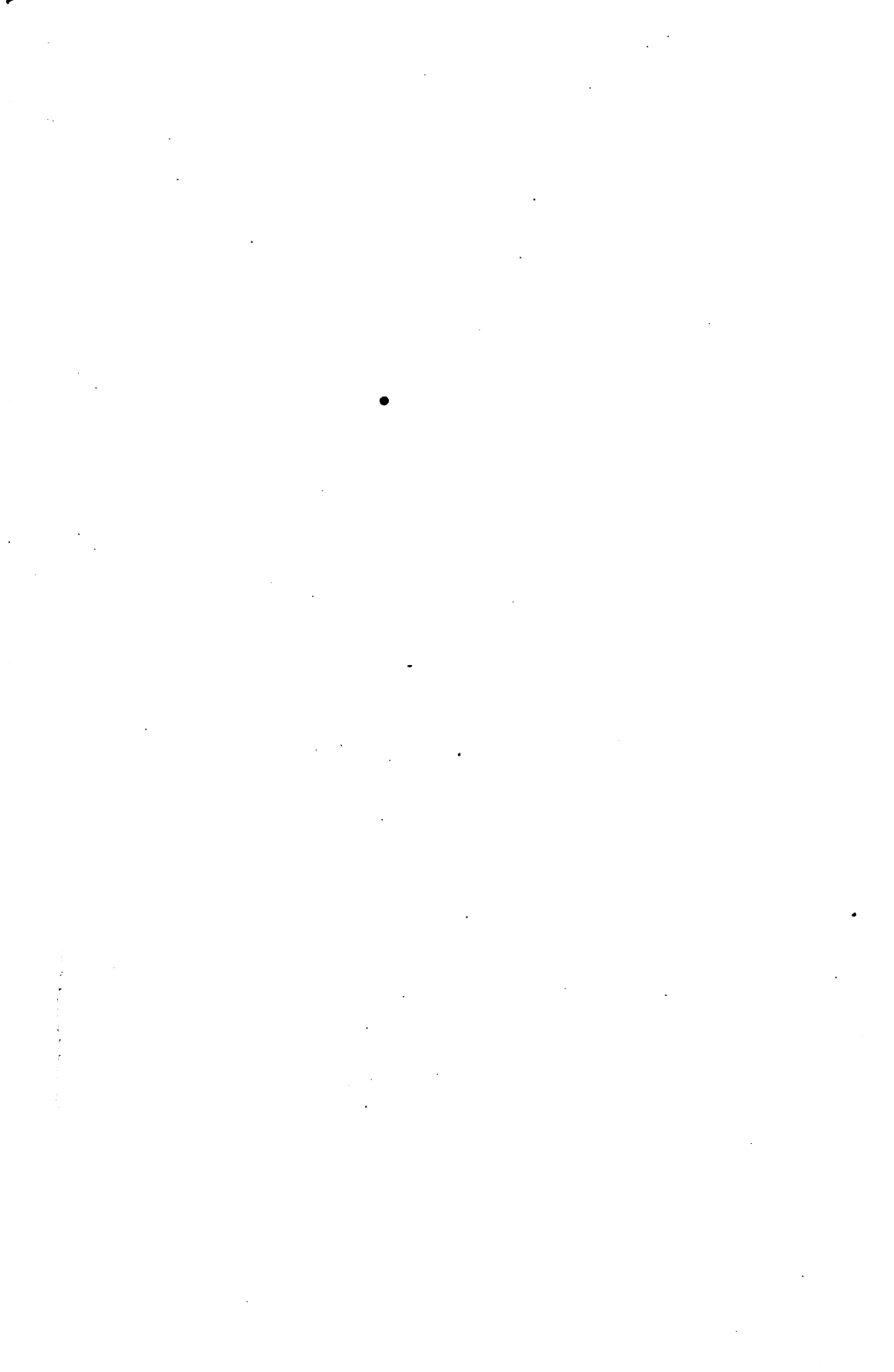


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Rec. Dec. 12, 1905

ERRATA.

- Page 21 line 7 from bottom dele "the" and "or."
 " 22 margin line 7 from bottom, for "Testotor's" read "Testator's."
 " 26 line 18 from bottom, for "theestate" read "the estate."
 " 33 line 9 from top, for "inprobably" read "improbable."
 " 34 line 3 from bottom, for "J. H. Jones" read "B. H. Jones."
 " 72 line 17 from top, for "Pitchen," read "Pickin."
 " 100 lines 2 & 3 from bottom, for "Hindoos" read "Hindses."
 " 103 line 25 from top, for "from" read "for."
 " 109 at bottom, for "retain" read "detain."
 " 110 line 5 from top, for "deserted" read "deserter."
 " 111 line 2 from top, dele "that."
 " 114 line 14 from top, for "1884" read "1883."
 " 116 line 17 from bottom, for "proceedings" read "proceeding."
 " 118 line 6 from bottom, for "intoxication" read "intoxicated."
 " " line 7 from bottom, for "persons" read "person."
 " " line 20 from bottom, for "establishes" read "established."
 " 120 line 14 from bottom, for "Acts" read "Act."
 " 121 line 18 from top, for "Connasel" read "Counsel."
 " 123 line 18 from bottom, between "trespass" and "to," dele "or."
 " 124 line 22 from bottom, after "claim" insert "was."
 " " line 26 from bottom, for "prohibtion" read "prohibition."
 " " line 34 from bottom, for "geo" read "Geo."
 " 126 line 17 from bottom, for "receiptis" read "receipt is."
 " 129 line 13 from top, for "J. P. Haynes" read "A. P. Haynes."
 " 132 line 5 from bottom, for "Morden & Porter" read "Morden v. Porter."
 " 133 line 20 from top, dele "been."
 " 135 line 10 from bottom, for "really" read "realty."
 " 137 between lines 12 & 13 from bottom insert "The Solicitor-General instructed by Mr. Yearwood appeared for the respondent."
 " 138 line 18 from bottom, for "defendants" read "defendant."
 " " line 20 from bottom, between "in" and "paper" insert "the."
 " " line 22 from bottom, for "by" read "in."
 " " line 28 from bottom, for "appellant" read "plaintiff."
 " 143 line 8 from bottom, after "exposure of" insert "it."
 " 148 line 18 from top, after "Mr. Clarke" insert "instructed by Mr. Yearwood," and after "Mr. Greaves" insert "instructed by Mr. Fleming."
 " 150 line 21 from top, for "1889" read "No. 89."
 " 153 line 14 from top, before "entered" insert "and."
 " 158 line 21 from bottom, for "appellant" read "respondent."
 " 161 line 2 from top, for "callendar" read "calendar."
 " 162 line 2 from bottom remove bracket before "Mr. Goodman" and insert it before "instructed."
 " 165 line 18 from top, for "Westham v. Isles" read "West Ham v. Isles."
 " 170 line 12 from top, for "Brown" read "Browne."
 " 171 line 4 from top, for "regards" read "regard."
 " 173 line 18 from top, for "Wightham" read "Wightman."
 " 175 line 27 from top, for "in" read "on."
 " 177 line 29 from top, for "cause" read "cost."
 " 185 line 17 from bottom, dele "that."

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(Salkeld 411.)

BLANKARD.

v.

GALDY.

In debt on a bond, the defendant prayed *oyer* of the condition, and pleaded the Statute E. 6. against buying offices concerning the administration of justice; and averred, That this bond was given for the purchase of the office of provost-marshal in *Jamaica*, and that it concerned the administration of justice, and that *Jamaica* is part of the revenue and possessions of the Crown of *England*: The plaintiff replied, that *Jamaica* is an island beyond the seas, which was conquered from the *Indians* and *Spaniards* in Q. *Elizabeth's* time, and the inhabitants are governed by their own laws, and not by the laws of *England*: The defendant rejoined, That before such conquest they were governed by their own laws; but since that, by the laws of *England*: *Shower* argued for the plaintiff, that, on a judgment in *Jamaica*, no writ of error lies here, but only an appeal to the Council; and as they are not represented in our parliament, so they are not bound by our statutes, unless specially named. *Vide And.* 115. *Pemberton contra* argued, that by the conquest try conquered, of a nation, its liberties, rights, and properties are quite lost; that by consequence their laws are lost too, for the law is but the rule and guard of the other; those that conquer, cannot by their victory lose their laws, and become subject to others. *Vide Vaugh.* 405. That error lies here upon a judgment in *Jamaica*, which could not be if they were under the same law. *Et per Holt, C. J. & Cur.,*

1st, In case of an uninhabited country newly found out by *English* subjects, all laws in force in *England* are in force there; so it seemed to be agreed.

2dly, *Jamaica* being conquered, and not pleaded to be parcel of the kingdom of *England*, but part of the possessions and revenue of the Crown of *England*, the laws of *England* did not take place there, until declared so by the conqueror or his successors. The *Isle of Man* and *Ireland*, are part of the possessions of the Crown of *England*; yet retain their ancient laws: *That in *Davis* 36, it is not pretended, that the custom of *tanistry* was determined by the conquest of *Ireland*, but by the new settlement made there after the conquest: that it was impossible the laws of this nation, by mere conquest, without more, should take place in a conquered country; because, for a time, there must want officers, without which our laws can have no force: That if our law did take place, yet they in *Jamaica* having power to make new laws, our general laws may be altered by theirs in particulars; also they held, that in the case of an infidel country, their laws by conquest do not entirely cease, but only such as are against the law of God; and that in such cases where the laws are rejected or silent, the conquered country shall be governed according to the rule of natural equity. Judgment *pro quer.*

S. C. 4 Mod. 215
222. 223, &c.
See the plead-
ings. Ibid.
Comb. 228.
Holt 341.

Where an uninhabited country is found out and planted by *English* subjects, all laws in force here are immediately in force there; but in the case of an inhabited country conquered, not till declared so by the conqueror. *Vide* 3 Keb. 401, &c. 2 And. 116. 4 Leon. 68, 7 Co. Cal. vin 23. Vaugh. 279. &c. 2 Vent. 4. Post. 666 Comber. 228, 229. 2 Mod. 45. 2 Mod. 45. 2 Wms. 75. Sho. Parl. Ca. 81. 1 Bl. Com. 106. *Vide* Cowp. 208. 4 Bur. 2500. Dong. 38.

Post. 510. 5 Mod 187.

MEMORANDUM.

(2. *Peere Williams*, 75.)

CASE 15.

An uninhabited country newly found out, and inhabited by the English to be governed by the laws of England.

A conquered country to be governed by such laws as the conqueror will impose; but until the conqueror gives them new laws, they are to be governed by their own laws, unless where these last are contrary to the laws of God, or totally silent.

[* 76]

Memorandum, 9th August 1722, it was said by the master of the rolls to have been determined by the lords of the privy council, upon an appeal to the king in council from the foreign plantations,

1st. That if there be a new and uninhabited country found out by *English* subjects, as the law is the birthright of every subject, so, wherever they go, they carry their laws with them, and therefore such new found country is to be governed by the laws of *England*; though after such country is inhabited by the *English*, acts of parliament made in *England*, without naming the foreign plantations, will not bind them; for which reason, it has been determined that the statute of *frauds and perjuries*, which requires three witnesses, and that these should subscribe in the testator's presence, in the case of a devise of land, does not bind *Barbados*; but that,

2nd. Where the king of *England* conquers a country, it is a different consideration: for there the conqueror by saving the lives of the people conquered, gains a right and property in such people; in consequence * of which he may impose upon them what laws he pleases. But,

3rd. Until such laws given by the conquering prince, the laws and customs of the conquered country shall hold place; unless where these are contrary to our religion, or enact any thing that is *malum in se*, or are silent; for in all such cases the laws of the conquering country shall prevail.

NOTE—The Mortmain Act, (Imperial Statute) has been held not to apply to Grenada (a conquered colony), *Attorney General v. Stewart*, 2 Mer. 143; or to New South Wales (a settled Colony) *Whicker v. Hume*, 7. H.L. 124; 21. L.J. C.H. 406; 1 de G.M. & G. 506. In the last case it was further held that the Mortmain Act did not apply to any British colony. *Attorney-General v. Stewart* and *Whicker v. Hume* were approved in *Jes. v. McKinney* L.R. 14. Ap. Cases 77.

1831.

HENRY

v.

BYAR.

HENRY v BYAR.

(1. *Knapp*. 388.)

Costs under the circumstances of the case allowed to the appellant and he being a mortgagee of property in the West Indies, directed to be raised together with the mortgage money, by a sale of the

THE appellant filed a bill in the Court of Chancery at Barbados for the foreclosure and sale of twenty-two slaves, which had been mortgaged to him by the respondents. They put in their answer, and alleged that although the mortgage was for 400*l.* yet that 300*l.* only had been in fact advanced, 100*l.* having been detained by the appellant as a premium, and they insisted therefore that the transaction was usurious, and that the bill ought to be dismissed. They did not however examine any witnesses, or bring forward any evidence to support these allegations. The Court below, on the 10th May 1830, pronounced a decree, dismissing the bill. From that the present appeal was instituted. The respondents did not appear, and the case was heard *ex parte*.

Burge and Walcott for the Appellants,

1831.

contended that the decree ought to be reversed because there was no evidence produced to substantiate the charge of usury; and that as it was the case of a mortgagee the costs of this appeal ought to be taxed by a master in Chancery here, and added to the mortgage debt.

HENRY
v.
BYAR.

mortgaged property, in case of nonpayment by the respondents.

The MASTER of the ROLLS.

Intimated the assent of their Lordships.

The costs were accordingly taxed by a Master at 137*l.* 7*s.* The following order, in pursuance of their Lordships' report, was made on the 31st January 1831;

"That the decree of the court below should be reversed, with 137*l.* 7*s.* costs; and that in lieu of the said decree directions should be given to a Master of the said court to take an account of what is due to the appellant for principal and interest on his mortgage, and to tax his costs of suit in the said island; and that upon the respondents paying to the appellant what shall be found due to him for principal, interest and costs of suit in the said island, together with 137*l.* 7*s.* costs of this appeal, at such time and place as the said Court shall appoint, the appellant shall be directed to execute a proper re-conveyance of the said mortgaged slaves, and to deliver up all deeds and writings in his custody or power relating thereto; but that in default of the said respondents paying to the appellant the principal, interest and costs aforesaid, as appointed by the said Court, the said slaves or a sufficient number thereof, should be directed to be sold, agreeably to the rules and practice of the said court for the purpose of satisfying such principal, interest and costs."

TURNER v COX. *

(8 Moore P.C. 288.)

1853.

THE Appellants, in this case, were the assignees of the estate and effects of *Higginson* and *Deane*, merchants and copartners trading in *Liverpool*, under the firm of Messrs. *Barton, Irlam* and *Higginson*, and in *Barbados*, under the firm of Messrs. *S. was seised of real estate in the Island of Barbados. S. was indebted to T. in a sum secured by S's bond, and at the death of T., in the lifetime of S., such bond debt was due. T. by his Will appointed S., his executor, who proved and acted*

*Present: The Lord Justice Knight Bruce, the Lord Justice Turner, the Right Hon. Dr. Lushington, the Right Hon. Sir Edward Ryan, and the Right Hon. Sir John Patteson.

1853.

TURNER v. COX

in the trusts thereof. S. after T.'s death, regularly entered up his books debiting himself, not only with the principal but the interest of this debt annually as it accrued. In this state of affairs S. died, being at the time indebted to B.H. & Co., of Liverpool, and having by his Will devised his real estates in Barbados to trustees for sale, subject to his debts, and directed them to consign the crops of such real estates to B.H. & Co., until the several debts due by him to them should be paid in manner therein described. Held, (affirming the judgment of the court in Barbados, in a creditor's suit, in marshalling the assets of S.) First. That the fact of T. appointing S. his executor, did not in equity change the character of the debt due to T., and that such debt remained a specialty debt, as though a stranger had been appointed executor, and retained its priority. Second. That the Statute 5th Geo.

The suit was brought under these circumstances: *Sharp* in his lifetime executed a bond to *John Tapin*, late of the Island, deceased, dated the 29th of *March*, 1825, for securing the sum of £1,500 currency, which bond remained due at the death of *Tapin*, who died in the lifetime of *Sharp*, having by his Will bequeathed his residuary estate to certain persons, and appointed *Sharp* executor, who proved the Will, and acted as such executor. *Sharp*, being indebted to *Higginson & Deane*, for money lent by them to him, to secure the payment of part of his debt, and interest thereon; on the 28th of *December*, 1843, confessed a judgment to them on a declaration filed in the Court of Common Pleas for *Barbados*, for the sum of £5,000 sterling, with interest at £5 per cent., from the 18th of *December*, 1843, on which execution issued on the 28th of *December*, 1843. Being further indebted to *Higginson & Deane*, *Sharp*, on the 4th of *May*, 1844, confessed a subsequent judgment to them on a declaration filed in the same Court, for a further sum of £5,000, with interest at the rate of £5 per cent., from the 4th of *May*, 1844, on which judgment execution issued on the 4th of *May*, 1844. He was also largely indebted to them for money lent, and for goods sold by them to him for the supplies of his estate, and for money paid by them on his account. *Sharp* was also indebted to the *West India Bank* upon a bond, dated the 14th of *November*, 1845, whereby the Respondent, together with *Cox* and *George Sharp*, became bound to the Bank in the penal sum of 26,000 dollars for securing the several sums of money therein mentioned.

Sharp died on the 9th of *May*, 1846, seized of certain plantations in the Island, called "*Claybury*" and "*Brewsters*," with the appurtenances and the stock and effects thereon, and entitled to personal estate, having made his Will, dated the 23rd of *October*, 1845, by which, after bequeathing certain legacies and annuities, he devised his house at *Claybury*, with its offices, gardens and pleasure grounds, and his sugar-work plantation and lands adjoining, in the Island of *Barbados*, with the appurtenances and the live and dead stock thereon, and in general, every article, matter and thing, including all the produce of the plantation at the time of his decease, and the several chattels in his Will described, and every removable article, except silver and plated articles, monies and securities for money about his mansion-house at the time of his decease, unto and to the use of his son, *George Sharp*, and his son-in-law, *Cox*, their heirs, executors, administrators and assigns, subject to the payment of such of his debts and legacies as should not be paid and liquidated by the means and in the manner thereafter mentioned, upon trust, so long as one of his four single daughters, *Sarah Sharp*, *Henrietta Sharp*, *Elizabeth Clarke Sharp*, and *Wilhelmina Sharp*, should live and be unmarried, to permit and suffer such of them as should so remain unmarried, to reside in and occupy the mansion-house, &c., free of rent, and to have the use of his chattels, therein mentioned; and he thereby empowered his trustees, as long as any of his daughters should be unmarried, to cultivate and manage his plantation; and to apply the annual produce of the estate; first, in payment of the costs incurred in the trusts as

therein mentioned; secondly, in keeping down the interest, and gradually liquidating such of his debts and legacies as should not be paid off and discharged by the means thereafter provided for the payment thereof; and afterwards, upon certain trusts therein mentioned, with powers of sale and investment, for the benefit of the testator's four daughters. And he further authorized the trustee or trustees, for the time being, of his Will, if any of his debts or legacies left unpaid by the means thereafter provided for payment thereof, should be called for at a time when they should be unable to meet the payment thereof, to borrow so much money as would enable them to pay off and satisfy the same, and to charge his plantation called "*Claybury*," and the lands, buildings and appurtenances thereto belonging, with the payment thereof; and he directed, authorized and empowered his executors and executrixes thereafter named, or any or either of them who should qualify to that his Will, as soon as convenient after his death, to sell and dispose of his plantation called "*Brewsters*," in the Island, with the lands, buildings and appurtenances thereto; and also a piece or parcel of land situate in the parish of Christ Church, and to execute conveyances thereof and give receipts for the purchase-money thereof as therein mentioned; and such purchase-money when received, together with all debts which might be due to him at the time of his death, save and except the debt due to him from *Cox*, which he bequeathed upon certain trusts, and all other property of which he might die possessed, not thereinbefore mentioned, he directed to be paid and applied by his said executors and executrixes, qualified as aforesaid, in payment of the debts due from him at the time of his death, and the legacies thereinbefore bequeathed; and all such debts and legacies as should not be paid by the sale of his plantation "*Brewsters*," the piece or parcel of land and other effects and property as aforesaid, he thereby charged on his plantation called "*Claybury*," with the lands, buildings and appurtenances thereto belonging. And when the plantation called "*Claybury*" should be sold, under the provisions contained in his Will, he directed the chattels therein mentioned to be sold, and the proceeds thereof to be equally divided amongst his daughters, *Sarah*, *Henrietta*, *Elizabeth Clarke* and *Wilhelmina*, or such and so many of them as should be living. And he directed that the crops of the plantations "*Brewsters*" and "*Claybury*," until the same should be sold, should be shipped and consigned to the house of Messrs. *Barton, Irlam, & Higginson* of *Liverpool*, until the debt due from him to them should be paid off and discharged. And the rest residue and remainder of his estate and property, real, personal and mixed, there and elsewhere, whether in possession, reversion, remainder or expectancy, he gave, devised and bequeathed unto his son *George*, his heirs, executors, administrators and assigns. And he appointed his son *George*, his son-in-law, *Cox*, and his four daughters, executors and executrixes of his Will, thereby declaring that the appointment of them as such executors and executrixes should not discharge or exonerate

1853.

TURNER v. COX

II., c. 7, s. 4, made real estates in the *West Indies* legal assets, in such a way as to give the same priority to specialty creditors against real estate, as they previously had against personal estate, and that it was not competent to a Testator by devise, to change the legal distribution of his assets, by directing a distribution equally among his creditors.

Quære? Whether the direction in the Will of S., that the produce of the real estates should be consigned to B. H. & Co., in *Liverpool*, until the debt due by him to them should be paid off and discharged, created a lien by S. in B. H. & Co.'s favour upon the proceeds of those estates directed by the will to be sold, for any debt which, at the time of the death of S., might be owing to B. H. & Co.? Such point not having been raised in the Court below by the exceptions to the Master's report, or at the hearing of the exceptions, the Ju-

1853.

TURNER v. COX

—
dicial Committee,
as a Court of the
last resort, de-
clined to enter-
tain the ques-
tion.

The case of *Charl-
ton v. Wright* (12
Sim. 274), which
ruled that real
estates in the
West Indies
might, since the
passing of the
5th Geo. II.,
c. 7 s. 4, be devis-
ed, so as to make
them equitable
assets, observed
upon and over-
ruled.

them from any debts or debt which should be due to him from them or any or either of them.

The Testator died on the 9th of May, 1846, leaving *George Sharp*, his son and heir, him surviving.

George Sharp and *Cox* proved the Will in the Island, and entered into possession of the estates, and received the rents thereof.

On the 13th of November, 1847, a fiat in bankruptcy was issued against *Higginson & Deane*, and the Appellant, *Turner*, was appointed official assignee, and the other Appellants, *Shand*, *Imrie*, and the *Bookers*, were chosen creditors' assignees of their estate and effects.

The Appellants, as such assignees, brought an action in the Island against *Cox* as executor (*Sharp* being then absent from the island), for the recovery of the debt due to the firm from *William Sharp*; and *Cox* confessed judgment thereon, for the sum of £10,075. 14s. 8d., with interest, from the 29th of May, 1846, on which judgment a writ of execution issued on the 21st of August, 1849. On the same day, *Cox*, as such executor, confessed judgment to the *West India Bank*, in an action brought by them on the bond for the sum of £2,708. 6s. 8d., interest and costs, and execution issued on the same day.

The "*Claybury*" and "*Brewsters*" plantations were not sold by the executors.

On the 15th of January, 1850, the Appellants, *Turner*, and the other assignees of *Higginson & Co.*, filed a creditors' suit in the Court of Chancery of *Barbados* against *Cox* and others, praying that an account might be taken of the monies due to them as such assignees, for principal and interest, from the estate of *William Sharp*, on the several judgments, and also an open account of the other debts owing by *Sharp* at the time of his death; and also an account of his personal estate and effects received by his executors *Sharp* and *Cox*; and also an account of the rents and profits of the real estate whereof he died seised, and which had come to the hands of his executors; and should it appear by the answer of *Sharp* and *Cox*, that the personal estate of *Sharp* would be insufficient to pay his debts, and that it would be necessary to sell all the real estate whereof he died seised, that the plantations called "*Brewsters*" and "*Claybury*," with the lands, buildings, stocks and appurtenances thereof and thereto respectively belonging, and the pieces or parcels of land, in the parish of *Christ Church*, directed by his Will, might be sold, and all other his real estate might be ordered and adjudged and decreed to be sold by one of the Masters of that Court, according to the course and practice of the Court, and that the monies arising by such sale, and all the personal estate of *Sharp*, might be applied in a due course of administration, and thereout that the plaintiffs might be paid what the Master should report to be due to them on account of the several judgments and other claims of the plaintiffs, as such assignees; and that all proper parties might be directed to join in the sales of the plantations and real estates and premises.

The Defendants by their answer, set forth that the personal

estate was insufficient. The cause came on to be heard on the 14th of *November*, 1850, when it was by consent ordered and decreed, that the Master should take the usual accounts and put up for sale the two plantations "*Claybury*" and "*Brewsters*." 1853.
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On the 19th of *December*, 1850, the Master made his report whereby he reported that in pursuance of the decree he had caused an inventory to be taken of each of the sugar plantations called "*Claybury*" and "*Brewsters*," with the lands, buildings, cattle, quick and dead stock, plantation implements and utensils thereon, and thereto respectively belonging, and on the 28th of *November*, 1850, by the estimation on oath of seven substantial and indifferent freeholders of the island that he had valued "*Claybury*" plantation, stock and premises, at £18,928. 15s. 2d. sterling, and that on the 24th of *November*, 1850, by the estimation on oath of six substantial and indifferent freeholders of the Island, he had valued "*Brewsters*" plantation, stock and premises at £9,837. 19s. 10½d. sterling. That in the course of the time limited for the sale of the abovementioned plantations called "*Claybury*" and "*Brewsters*," *Charles F. Lyall, Esq.*, offered and bid the sum of £22,750 currency of the United Kingdom of *Great Britain and Ireland* for "*Claybury*" and that he had sold to *Lyall* the "*Claybury*" plantation, stock and premises for £22,750 sterling, and delivered possession thereof, and that he had sold "*Brewsters*" plantation to *Nathaniel Riston, (a) Esq.* for £13,654 sterling, and delivered possession thereof to him.

By the Master's further report, dated the 25th of *December* 1851, he reported that in obedience to the decree, he called before him by public advertisement the proprietors of the several demands and incumbrances which were liens on and affected the plantations, with their papers, vouchers, documents, and witnesses, touching and concerning the same; and having duly examined the same, he proceeded to rank and class the demands in their due course of priority, according to the nature thereof respectively, which several debts, liens, and incumbrances were set forth and shown in a schedule annexed to his general report, and which he prayed might be taken and considered as part thereof.

The schedule thus annexed set forth the various debts and incumbrances according to their legal and equitable priority, which were general liens affecting these two plantations, and ranked and classed the debts due from the estate; and, among others, the Master found that three sums were general liens against the two plantations "*Claybury*" and "*Brewsters*," and due in manner and order following:—First, to the residuary legatees under the Will of the late *John Tapin*, a sum of £1,500 currency and interest, or £1,938. 18s. 10d. sterling, due on the bond, dated 29th *March*, 1825, granted by the testator *William Sharp* to *John Tapin*; Secondly, to the *West India Bank*, a sum of £3,168. 15s. 4d. for principal and interest, on a judgment and execution, dated 21st *August*, 1849, confessed by *Cox*, the executor of the Testator, upon a joint and several bond of the Testator and others, dated 14th *November* 1845, given to the

(a) *Sic* in original; but correctly, *Kirton*.

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The Appellants took two exceptions to this report: First, that the Master had ranked the sum of £1,938. 18s. 10d., sterling, reported by him to be due to the residuary legatees of *John Tapin* deceased, by virtue of the bond dated the 29th of *March*, 1825, made by *Sharp*, whereby *Sharp* bound himself, his heirs, executors, administrators and assigns, to pay *Tapin*, his heirs, executors, administrators and assigns, the sum of £1,500 late current money of the Island, with legal interest thereon from the day of the date of the bond, until the whole and every part thereof should be paid and satisfied as payable out of the purchase-money arising from the sale of the sugar-work plantations "*Claybury*" and "*Brewsters*," prior and preferable to the sum of £11,075. 11s. 10d., reported to be due to the complainants under the judgment confessed by *Cox*, executor of *Sharp*, on the 21st of *August*, 1849, to the assignees of *Higginson & Deane*, bankrupts, on which judgment execution issued on the 21st of *August* 1849; whereas the Master ought to have reported the sum of £11,075. 11s. 10d., due by virtue of the judgment and execution, prior and preferable to the sum of £1,938. 18s. 10d., stated in the Master's report to be due on the bond, if the purchase-money arising by the sale of the plantations be legal assets, but if such purchase-money should be deemed equitable assets, then the Master should have ranked the same equally with the sum of £1,938. 18s. 10d.; and as a further exception, they alleged, that the bond became released and extinguished by reason of *Tapin* having, by his Will, appointed *Sharp* an executor thereof, who, after the decease of *Tapin*, qualified himself to act as such executor. Secondly, that the Master had by his report ranked the sum of £3,168. 15s. 4d., reported to be due to the *West India Bank*, under a judgment and execution, dated the 21st of *August*, 1849, confessed by *Cox*, as executor of *Sharp*, and stated in the report to have been confessed upon the bond dated the 14th of *November*, 1845, whereby *William Sharp*, together with *Cox*, and one *George Sharp*, became jointly and severally bound to the *West India Bank* in the penal sum of 26,000 dollars, for securing the principal sums of money, interest and stocks, amounting to the sum of £3,168. 15s. 4d., before the sum of £11,075. 11s. 10d., and under the judgment confessed by *Cox* as executor of *Sharp* to the complainants; whereas the Master ought to have reported the sum of £11,075. 11s. 10d. due under the judgment and execution to the complainants, to rank equally with the judgment and execution of the *West India Bank*, the same bearing even date with each other.

These exceptions came on for argument before the Court of Chancery in *Barbados*, on the 20th of *November*, 1851, and after hearing the arguments, the Court reserved its judgment.

Previously to giving judgment, it was referred to the Mas-

ter to ascertain whether the executors of the testator appeared to have known of the bond debt of *Tapin*. The Master reported that the amount of the bond debt was entered up in the Testator's books as against himself, both principal and interest; and moreover that the Master had the bond in his possession.

The Court overruled both exceptions.

The material part of the judgment of the Court, overruling the exceptions, was in these terms:—

“The questions which are raised and have been argued on these exceptions, are—First, whether the purchase-money arising from the sale of the estates is to be considered and administered by this Court as legal or equitable assets; and Secondly, whether a specialty debt, a debt on bond against the Testator, his heirs and assigns, is, according to the law of this Colony, and the course of administration of assets in the payment of debts by this Court to be ranked below a debt on simple contract against the Testator at the time of his death, because his executor has confessed to such simple contract creditor a judgment for its amount.

“It is admitted, that this is the first time this question has been raised in this Court, and the question must be considered on general principles and the law of the Colony, as well as it is affected by the terms of the decree in the cause.

“It appears that the whole assets of the Testator consist, with the exception of some plate, of the purchase-money for these estates, and that having all come into the hands of the Master, the Court is called on to administer them instead of the executor, to use the language of the bill, ‘in a due course of administration.’ The decree, which is by consent, directs the Master to ‘take an account of all the debts, demands, and incumbrances which are liens on and affect these plantations, and to rank and class them in a due course of preference, according to the legal priorities and nature thereof respectively, to ascertain which it authorizes the Master ‘to examine, if necessary, the parties and their witnesses, on oath, and their vouchers and documents touching the same.’ This is the usual decree that has been passed by this Court for a series of years in such cases; the practice under it, therefore, is well established. What then is that due course of administration? It cannot be denied that, in administering the assets of a Testator, this Court has invariably followed the rules of law, that it has always applied such assets exactly as the executor by law is bound to do in liquidation of a Testator's debts; and that, in the Master's office, in ranking the debts of a deceased party, that officer has uniformly followed in his reports the rules of priority, which, according to their several degrees, the law has established respecting the payment of debts. Is there anything in the nature of this property, which the Court is called on to administer instead of the executor, which ought to induce it to vary from these rules of legal priority, which are not only in accordance with the law of the Colony and the established practice of the Court, but in strict obedience to the terms of the decree in the cause?

“One of the grounds of exception taken to the Master's

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report has raised the question, whether the purchase-money of these estates is to be considered in the hands of the Master as legal or equitable assets; and as this is the first time this doctrine has been mooted in this Court, it is proper to inquire into its origin and application to this Colony.

“By the common law of England, it is true that specialty creditors had no lien on the lands of the debtors before judgment, and simple contract creditors had no rights against real estate; and before the Statute of Fraudulent Devises (3 & 4 Will. & Mary, c. 14) testators could by Will disappoint their creditors of all resort to their freehold estate, by devising it away from them; and it was from the exercise of this power that a necessity for the introduction of the doctrine of equitable assets arose in the Courts of the mother country. It has been well remarked by a recent commentator on English law that ‘few defects in English jurisprudence are more surprising, because more repugnant to the natural sense of justice, than this exemption of landed property from debts.’ The redress, however, though late, and effected by slow degrees, is now complete under the provisions of the Imperial Act of the 3rd & 4th Will. IV., c. 104.

“But this was a principle of the common law, which, if it ever had any operation in this Colony (and I can find no trace of it), was soon set aside as wholly unsuited to its condition and circumstances, and real estate made liable for simple contract debts, and this without at all interfering with the rights of specialty creditors to enforce their claims according to their legal priorities. This is evident from the preamble of the Act of the colony, No. 189 (*Hall's Laws of Barbados*, p. 340), in which it is stated, that ‘all lands have ever been looked upon as chattels for the payment of debts, though what remains afterwards do descend to the heir-at-law, or go to the devisee, and on that principle, or perhaps by virtue of some express law not now to be found, it has been customary for marshals to extend estates both of land and negroes, and to execute bills of sale for the same in fee or otherwise, according to the interests debtors had therein, although executions did in truth issue on judgments obtained only against executors or administrators; and whereas proceedings of the like nature, have also from time to time been had with regard to decrees obtained in the Court of Chancery, as well as on the equity side of the Court of Exchequer, and writs of execution issuing thereon, all which have appeared not very regular to such as are unacquainted with the laws, constitution, and practice of this place. To the end that the law may be explicit and certain for the future in these respects,’ it enacts ‘that such proceedings shall be deemed, and they are hereby declared to be good, valid, and effectual to all intents and purposes whatsoever.’ This Act was passed in 1745, and shows that the land in this Colony has ever been liable by law for simple contract debts, as well as specialty, being ever looked upon as chattels for their payment, and this whether in courts of equity or courts of law. The like necessity, therefore, for the introduction of the doctrine of equitable assets never existed in this

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Colony, for, by the practice of this Court, and by means of such suits as the present, the claims of every class of creditors have always been effectually secured according to their legal rights and priorities out of the purchase money obtained by the sale of real estate under its decrees. It is not unimportant to remark that this was the law of the Colony, irrespective of the Imperial Act 5 Geo. II., c. 7, s. 4, which made real estate in the Colonies assets for the satisfaction of debts, in like manner as estates are by law in *England* liable to the satisfaction of debts due by bond or other specialty. The Act of Geo II. was passed in 1732, and the Law 189 (*Hall's Laws of Barbados*, p. 340), in 1745. Yet it not only does not refer to the Act of Parliament, but it declares that land has ever been looked on as chattels for the payment of debts in this Colony. This principle is to be traced in all our local laws and in the records of this Court. In an Act passed in 1835, to regulate the sale of lands attached under executions issuing out of the several Courts of Common Pleas, or the Court of Exchequer, or the Court of Chancery, 'the provost-marshal is directed to execute a conveyance of the property so sold, and such conveyance shall be good and effectual in the law for the purpose of conveying all the estate, right, title and interest of the debtor in and to the property so conveyed, and that such property shall not be subject to be redeemed by the debtor, or his heirs, any law, usage or custom to the contrary notwithstanding.' An equity of redemption, or any other equitable or legal interest in land, may be taken in execution under a writ of execution. In fact, there never has existed in this Colony any different rule for the payment of debts in this Court, and, in the Courts of Common Law, all are paid according to legal priority, as ascertained in each Court respectively; and whenever parties, in order to secure a priority for their debts, have in the lifetime of the Testator had the precaution to place them on a basis of stronger obligation, it has been a rule in the administration of assets by this Court, that all creditors by specialty, in which the heir is bound (as in this case), shall be paid the full amount of their debts before any payment is made to creditors by simple contract. This is now the state of the English law, under the provisions of the 3rd & 4th Will. IV. c. 104; but all acquainted with the practice of this Court know that it has always been the law of the Court, its decrees and reports abundantly prove it; and the same point as that now under discussion was recently settled in the cause of *'Hardy v. Hollinside,'* and in which a bond of the Testator is ranked prior to a debt secured by the judgment of the executor: and on looking to the record, I find the bill signed by the same counsel and endorsed with the names of the same solicitors as in the present suit; and in that case, as in this, the assets in the hands of the Master were the purchase-money arising by the sale of a landed estate, under a decree of the Court, couched in the same terms as the decree in this cause. It is also to be remarked that assets are not made equitable in the Courts of the mother country by being recoverable in a Court of Equity, for that is the case with trust estates, neither are they

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by being capable of administration in such Courts alone; for instance, as in the case of traders in satisfaction of their simple contract creditors; but they must consist of mere equitable property, such as is liable only to the payment of debts by the help of a Court of Equity; there is no property of a debtor, equitable or legal, in this Colony, which may not be taken under our writs of execution at Common Law, still less can it be said that the property in the hands of the Master in this cause could only be reached by the aid of this Court, the whole of it being expressly liable at law, under the writ of execution on the judgment confessed by the executor to the assignees. Lastly, it is only necessary to add, that such being the rights of creditors by the law of the Colony, it is incompetent to any Testator, by any disposition in his Will, to deprive his creditors of the right to resort to his real estate for payment of their debts strictly, according to their legal priorities, where his assets are insufficient for the complete satisfaction of all his debts. I cannot, therefore, consider the purchase-money of these properties, in the hands of the Master, as equitable assets, and say that they ought to be administered as such by the Court, contrary to the law of the Colony, the practice of the Court, and the terms of the decree assented to by the parties to the suit.

“The next question is, the priority to be given in this Court between a bond debt of the Testator, in which his heirs, executors, administrators and assigns are bound by himself, in his lifetime, and a judgment confessed by his executor, on a simple contract debt of the Testator. It has been already stated that the Court, in this suit, is to administer the assets of the Testator in precisely the same way as the executor is bound to do, that the debts respecting which the questions of priority arise on the exceptions must be paid, if at all, or in part, out of the purchase-money of the estates; that that purchase-money is applicable to their payment ‘in a due course of administration,’ which the bill prays for, and it is admitted that the executor had due notice of these debts. The only point, therefore, is one of legal priority. Now, the duty of the executor in this matter is quite clear; he is bound to observe, in paying the debts of the Testator, those rules of law as to priority, according to the several degrees or nature of the debts which have been established at law, although he has a right among several creditors of equal degree, to prefer and pay any one before another, even though there should remain nothing to satisfy that other. Yet here his authority ends, he has no right to pay the debts out of their legal rank; nay, when sued for a debt of inferior degree he is bound to resist its payment if there be not property enough to satisfy the debt of higher degree; and that if, having notice of such debt of higher degree, he does not resist, but pays it, he is personally liable for the amount so paid to the injury of the prior creditor. This is the principle which must guide the Court in this question.

“The executor, no doubt, has a right to confess judgments for the debts of his Testator, and they will bind the lands of the Testator, which are assets, as chattels in his hands, for the pay-

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ment of debts; these judgments, are in truth, an admission of assets by *Cox*, though it appears by his answer that he knew the estate to be insolvent when he confessed them; but the executor, by giving judgments, cannot alter the relative positions in which the Testator, at his death, left the different classes of his creditors; his power of preference is limited to creditors of the same class, and debts of equal rank; he cannot by thus acting, give priority to junior creditors over those whose debts are of higher degree, and whom he was bound to pay before those to whom he has confessed these judgments; because by so doing he transgresses a rule of law, and fails in his duty; and, therefore, it is, that the judgments of an executor are held to be of a different nature to those against a Testator. All the old authorities concur in this, and the point is well laid down in *Williams' On Executors*, who writes, that a judgment against the executor himself is not to be considered within the same class as those which are recovered against the deceased, it stands altogether on a different footing; and, with respect to other creditors of the deceased, a creditor who has obtained a judgment against an executor has no priority, except with regard to debts of equal degree with that upon which he has obtained judgment, such being the order in which the executor was bound to pay these debts; such being the nature of the judgments confessed by the executor, being, of truth, of little value, save as an admission of assets as against himself, the land being previously liable, the Court, in administering these assets, can only permit these judgments to have the effect which the executor was legally authorized to give them; they will rank above the debts of all those creditors who, at the death of the Testator, were creditors by simple contract, and to whom the executor has not confessed judgments. To give them operation beyond this, would be to invest the executor with an authority which the law denies him, to the injury of those creditors whose legal rights would be thus taken from them.

"But, assuming that such was the effect of these judgments, wrongfully given by the executor, but on which no payment had been made, and, as in this case, the whole of the assets of the Testator are brought into this Court for administration, it cannot be supposed that this Court, in performing this duty, if it is discovered that the executor had given a security which, whether intentional or not, would, if sustained, deprive a creditor of his just and legal priority, and if paid, defraud him of his debt, would hold itself bound by the wrongful or mistaken act of the executor. Having a complete remedy in its power, by being possessed of all the assets of the Testator, it would not hesitate to apply it so as to do injustice to no one, and wholly regardless of any inchoate wrong of the executor, it would take care that a due course of administration was carried out by the Master.

"But, if this question were not so completely settled as it appears to me, by known principles and rules of law, as well as the practice of the Courts, I think the Master must, from the terms of the decree by consent, have ranked the bond creditors

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before those simple contract creditors of the Testator who had executorial judgments for their debts. Creditors take rank according to their respective classes as against the Testator's assets, when administered in this Court, according as they stood at the time of the death of the Testator; the executor has his course of duty laid down for him in paying them, and this Court has always enforced it in that order; but the Master has not been left, in this instance, to the general rule of law; the decree expressly enjoins him to rank and class these debts, liens, and incumbrances, and to pay them out of the purchase-money, 'according to their legal priorities and nature thereof respectively,' arming him with large power to discover their nature and right of preference. It is admitted that he has rightly described these debts in his report, and I am of opinion that he has rightly classed and ranked the bond debts of the Testator above the simple contract debts of the Testator, although the executor has given judgments for those debts. Nor do I think the fact of the executor having given a judgment to the *West India Bank*, for their bond debt, deprives them of the priority they had at the time of the Testator's death; for the Court is bound to take notice of, and the Master enjoined by the decree to inquire into, the nature of each debt, and to rank it accordingly, that is, according to its priority at the time of the Testator's death against his assets: it, therefore, is to be viewed as the bond debt of the Testator, and is properly ranked by the Master as such.

"With respect to the bond debt of *Tapin's* residuary legatees, which the exceptions claim to be considered as released, by reason of *Sharp* having been the qualified executor of *Tapin*, it is admitted that *Sharp*, in his lifetime, always considered this a valid debt against himself, and it appears to have been duly entered as such in his books, and the interest annually debited against him, which books the executor gave to the Master. It is quite true that, at law, the nomination of a debtor as an executor, by his creditor, is not merely a suspension of his right at law to recover his debt, since he cannot sue himself, and that where a personal action is once suspended by the voluntary act of the party entitled to it, the right is discharged, and thus the debt itself released. Yet, in this Court, that rule is held to operate only as between a Testator and his debtor; for, as between the debtor-executor and the creditors of the testator, it is an established rule in equity that the executor shall be accountable for the amount of his debt as assets, and this not merely for the payment of the Testator's debts, but also for his legatees, general or residuary, and for his next of kin. This debt having been always dealt with by *Sharp* as existing against himself, the exception, founded on the rule of law, cannot prevail."

From this decision *Turner* and others, the assignees of *Higginson & Deane*, appealed to the Queen in Council. The Respondents, the residuary legatees of *Tapin*, and the *West India Bank*, lodged separate cases.

Mr. *Rolt*, Q. C., and Mr. *Pryor*, for the Appellants.

The first question turns upon the effect of the Will of *Tapin*,

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the obligee in a bond, who has appointed the obligor his executor. At law the appointment of a debtor as executor is a release of the debt, *Freakley v. Fox* (a) *Wankford v. Wankford* (b) *Cheetham v. Ward* (c). Although in equity it is not so, as the executor is treated as a trustee for payment of debts, *Berry v. Usher* (d), yet we submit, that though in equity the debt is not extinguished, yet its priority as a specialty debt is taken away, and that in this case it ought to have been postponed to the Appellants' judgment, confessed by Cox as executor of *Sharp* in favour of the Appellants, which according to the law in the island of *Barbados*, is entitled to priority over all other debts of the Testator. But, independently of the question of priority a lien was created in the Appellants' favour by the direction for the consignment of the produce of the Testator's estate to *Higginson & Co.* until the debt should be discharged, which a Court of Equity would enforce. Thus in *Thompson v. Grant* (e), Sir *Thomas Plumer* decided, that an executor of an executor was entitled to retain, out of the balances of the produce of the original Testator's *West India* plantations, received by him as consignee appointed by the Court, debts due from the Testator to him, either in his own right, or as executor of the deceased executor.—[The Lord Justice *Knight Bruce*: This question of lien does not appear to have been raised by the exceptions, or at the hearing. No mention of it is made in the judgment.]—Even if the Appellants' debt is not entitled to such priority, still the purchase-money arising from the sale of the Testator's estates under the direction of his Will must be considered as equitable assets, and the Appellants are entitled to rank and to be paid out of the produce of such sale, rateably and equally, with the other creditors. The question of legal or equitable assets depends upon the Statute 5th Geo. II., c. 7. s. 4., which enacts that houses, lands, negroes, and other hereditaments, and real estates, situate in the plantations, shall be liable to, and chargeable with, all just debts, and shall and may be assets for the satisfaction thereof, in like manner as real estates are by the law of *England* liable to the satisfaction of debts due by bond or other specialty, and shall be subject to the like remedies in any court of law or equity for seizing, extending, selling, or disposing of such houses, lands, negroes, towards the satisfaction of such debts, &c., and in like manner as personal estates in any of the plantations respectively are seized, extended, sold, or disposed of for satisfaction of debts. This Statute was passed in the year 1732, and is clearly not affected by the Colonial Act, No. 189, of 1745 (f) which declares that lands in the Colony are deemed chattels, and liable for payment of debts, for the Colonial Act makes no reference whatever to the British Statute. Now the words in section 4 of the 5th Geo. II., c. 7., "in like manner as real estates are by the law of *England*," refer to, and must be construed, by the

(a) 9 Barn. & Cr. 130.

(b) Salk. 299.

(c) 1 Bos. & Pul. 630.

(d) 11 Ves. 87.

(e) Note, 1 Russ. 540.

(f) Hall's "Laws of Barbados," p. 340.

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Statute of Fraudulent Devises, 3rd Will. & Mary, c. 14, which was passed for relief of creditors, and contained provisions for real estate being made equitable assets for payment of debts, for lands fraudulently aliened have been held to descend to the heir as assets (a). We submit, therefore, that by the Statute, 5th Geo. II., c. 7., s. 4, it was competent to a Testator seized of real estate in *Barbados* to direct an equal distribution of his estate, in the manner the Testator in this case has done. The authorities upon this construction are conclusive. Thus, in *Charlton v. Wright* (b) the very question now in dispute arose upon this Statute, and the Vice-Chancellor *Shadwell* held, that real estate in the *West Indies* could under that Statute be made equitable assets.—[The Lord Justice *Knight Bruce*: In *Lyon v. Colville* (c), decided since *Charlton v. Wright*, the contrary was ruled.]—That case was confined to the compensation money given by the Slave Emancipation Act, 3rd & 4th Will. IV., c. 73. A direction in a Will to pay simple contract creditors before specialty creditors is good, being within the exception in the Statute of Fraudulent Devises, 3rd Will. & Mary, c. 14, *Millar v. Horton* (d).

Dr. LUSHINGTON :

Their Lordships are of opinion, that the Respondents' Counsel need only confine themselves to the construction of the Statute 5th Geo. II., c. 7, s. 4, as to how far it was competent for a Testator seized of real estates in the *West Indies*, by a disposition in his Will, to make them equitable assets.

Mr. Lloyd, Q. C., and Mr. Hislop Clarke, for all the Respondents.

The argument being limited to that one point, the simple question then is, whether the purchase-monies arising from the sale of the plantations of the Testator are, under his Will, equitable assets. Our contention is, that real estate in *Barbados* is by law, made legal assets for the payment of debts, and we submit, that the Testator was incapable of devising them so as to make them equitable assets, and that his debts, whether by specialty or simple contract, are payable thereout, according to their legal priority. This is apparent upon a sound construction of the Statute, 5th Geo. II., c. 7, passed for the more easy recovery of debts in the plantations in *America*. The fourth section enacts, that real estate may, by law, be extended and sold for payment of debts in like manner as real estates are, by the law of *England*, liable to satisfy debts due by bond or other specialty. From a local Act of *Barbados* passed in 1745 (e), subsequently to this Statute, it appears that real estate had ever been looked upon in that Island as chattels for payment of debts, though what remained went to the heir-at-law or to the devisee.—[Dr. *Lushington*: In the first report of the *West India*

(a) See Cases collected in Evans's Statutes, vol. i., p. 462, and see *ib.* 374 (2nd edit.).

(b) 12 Sim. 274.

(c) 1 Coll. 449.

(d) G. Coop. 45.

(e) Hall's "Laws of Barbados." p. 340.

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Commissioners upon the Island of *Barbados*, p. 226, the then Chief Justice of *Barbados* gives an account of the state of the modern Statute laws of the Colony, from which it appears that there are many laws not printed, and not known to the Chief Justice. This must induce caution before determining what the law upon this question really is.]—The Statute 5th *Geo.* II. c. 7, introduced no new law into the *West Indies*, for, prior to and independently of that Statute, real estate in *Barbados* could be sold, and was assets for payment of all debts by simple contracts as well as specialty, *Blankard v. Galdy* (a). That Statute must, therefore, be considered as confirmatory only of the then existing law (b). The judgment of the Court below clearly treats it in that light, and states that it has been the usage of the Courts of law and equity in *Barbados* to treat real estates as chattels for payment of debts. In *Lyon v. Colville* (c), the provisions of this Statute were discussed, and the Court held that the compensation money for slaves which is real estate, as representing the slaves, in *Jamaica* was to be distributed as legal and not as equitable assets. The case of *Charlton v. Wright*, so strongly relied upon by the Appellants, if examined, will be found not to be an authority entitled to much weight. From what appears from the report it may have been a short cause, and taken by consent. [The Lord Justice *Knight Bruce*; I was Counsel in that case; I have an indistinct idea that it was not argued hostilely; I strongly think that was the fact.]—The words of the Statute, 5th *Geo.* II., c. 7, sec. 4, are clear, and it is impossible to conceive how legal assets made by that Statute, could have been converted by the Court into equitable assets. The case of *Millar v. Horton* does not apply, as the question in that case turned upon the construction of the Statute of Fraudulent Devises, 3rd *Will. & Mary*, c. 14, in a case where the Testator directed all his debts to be paid, giving, however, a preference to the simple contract creditors, which was held not to be in fraud of the Statute. Here, nothing turns upon that point. Although the 5th *Geo.* II., c. 7, sec. 4, makes real estate liable to debts, it says nothing as to the priority. The principle which governs such a case is shown, by the judgment of the Court below, to be according to the several degrees or natures of the debt as in *England*.—[Dr. *Lushington*: How is it that the Respondents, the residuary legatees of *Tapin* and the *West India Bank*, put in separate cases?—They have distinct interests derived from separate titles.

Mr. *Pryor* in reply.

The Lord Justice KNIGHT BRUCE:

Three points have been made in support of this appeal, as to two of which their Lordships did not think it necessary to hear the Respondents' Counsel. Of those two, one was the question of the effect of the Will of an obligee in a bond making the obligor his executor; and it was contended that the

(a) 4 Mod. 226.

(b) Woodcock, "Laws of the West India Colonies." p. 211 (Edit. 1838).

(c) 1 Coll. 449.

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effect, though not to destroy the debt, was to take away priority from it, as a specialty debt. We are dealing with this question only as an equitable question; the law of the case, therefore, is, on the present occasion, immaterial; and their Lordships are of opinion, that in equity, and, therefore, in substance, the debt remained exactly as it was, exactly as it would have done, if a stranger had been the executor.

The second point on which their Lordships did not think it necessary to hear the Respondents' Counsel was, as to the lien said to have been given to the house of *Higginson Irlam & Co.* for their debt, by the direction in the Will, for the consignment of the produce of an estate of the Testator to them, until their debts should be discharged.

Their Lordships, who are of opinion that this is a point open to reasonable argument, do not give any judgment upon it. They think it not necessary to say how they would have dealt with it, if the question had been properly before them, for they are of opinion that it is not so. There is not the least trace of the point having been taken before the Master, or before the Court, and it would be too much to say that, when the case is before the ultimate Court of appeal upon exceptions merely, such a question, raised as I have said, neither before the Master nor before the Court, should be capable of being brought into controversy. There is, therefore, no ground of appeal so far.

The remaining ground, that upon which the Respondents' Counsel were heard, was the question of equitable assets, a question dividing itself into two branches; one, whether the effect of the Statute of 5th Geo. II., c. 7, was to render the real estate necessarily applicable to the payment of all the creditors equally: and, if not, whether it was competent to a Testator seized of such property to direct an equal distribution among his creditors, which, in effect, the Testator has done in the present case, if he could.

Their Lordships have considered this question with all the attention due to it upon its own account, and by reason of the manner in which it seems to have struck a distinguished Judge, now deceased, before whom the point was brought, and who appears according to a printed report, to have given an opinion upon it. I allude to the case of *Charlton v. Wright*; with reference to which, however, I may say, that, unless my memory misleads me, the argument there was not adversely conducted before that learned Judge, who, probably, had not the benefit of such a discussion as would have taken place if the instructions, under which the Counsel proceeded, had been of an adverse nature.

Their Lordships are of opinion, that, according to the true construction of the Statute of Geo. II. (taking both branches of the fourth section together), the legal priority of debts was not intended to be interfered with; they think that making, declaratorily or otherwise, real estate in the *West Indies* applicable to the payment of debts generally, the Legislature meant to do so in such a way as to give or secure the same priority to specialty creditors against real estate that they always have had against personal estate.

Much attention is, they consider, also due to the fact (as their Lordships believe historically true), that no time has ever existed in which, in the island of *Barbados*, real estate was not assets applicable to the payment of simple contract debts. There can be no doubt, that treating land there as mercantile property, or as merely subsidiary to trade, or in some other way which it is unnecessary to investigate closely, those who administered the law in that Island from the time when it became an English dependency have uniformly so dealt with real estate there.

Upon these grounds, whether taken together or separately, their Lordships come to the conclusion, that the real estate in this case was by law applicable, as well as the personal estate, to the payment of specialty debts, in the first instance, and, therefore, in preference to simple contract debts, and that it was not competent to the Testator to disappoint the rule of law in that respect. If it had been competent to a Testator so to disappoint the rule of law, this Testator has done so; but we are of opinion, I repeat, that it was beyond his power to do so; that it was as much beyond his power with regard to the real estate, as according to universal confession, it was with respect to his personal estate. In that sense his real estate and his personal estate stood on the same footing.

Their Lordships are of opinion, therefore, that the appeal is groundless, and must be dismissed with costs.

The circumstance that there are separate cases on the part of the Respondents seemed, in the first instance, to give rise to some ground of remark; an explanation upon this subject has been given at the bar which seems satisfactory, nor has the point been pressed against the Respondents on the part of the Appellants. Their Lordships though, not relying on the latter reason, do not think it right to recommend to Her Majesty to direct any difference to be made with regard to the costs on that ground.

Their Lordships cannot, however, wholly part with the case without observing that, as it seems to them, the petition of appeal is open to a remark of the same description, as to which there does not seem at present to be any sufficient explanation. Had their Lordships not been of opinion that the appeal must be dismissed with costs, it would probably have been necessary to make some remark, and some provision, indeed, with respect to that circumstance (a).

Appeal dismissed with costs.

(a) The petition was of an unusual length, setting out the pleadings and proceedings in the cause, *in extenso*.

WILSON v. CALLENDER. *

(9 *Moore P.C.* 100.)

THE appeal in this case was brought from an Order made by the

* Present: The Right Hon. T. Pemberton Leigh, the Right Hon. Sir Edward Ryan, Knt., the Lord Justice Knight Bruce, and the Lord Justice Turner.

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The Royal Instructions regulating appeals from *Barbados* to the Queen in Council, limit the right of appeal to cases in which the subject-matter involved

amounts to £300. The court at *Barbados* held, that certain accounts and documents sought to be recovered in an action of detinue, were of no value in themselves, and refused leave to appeal against a judgment of nonsuit in the action. Upon a petition for leave to appeal, founded upon an allegation that the value of the accounts and securities exceeded £300, their Lordships granted special leave to appeal. When the appeal came on for hearing, it appeared that the allegation as to the value of the accounts and documents was unfounded in fact and unsupported by evidence, upon which their Lordships stopped the case and dismissed the appeal with costs.

Court of Common Pleas in the Island of *Barbados* directing a verdict to be set aside and a nonsuit entered, in an action of detinue brought by the Appellant, as administrator of his deceased wife, against the Respondent, the trustee and executor of the Appellant's wife to recover certain documents, consisting of accounts current, securities for money, and promissory notes, belonging and relating to the separate estate of the wife, and which were in the possession of the Respondent as such trustee and executor. The Appellant applied to the Court for leave to appeal to Her Majesty in Council, but the Chief Justice, *Boucher Clarke*, held that he was precluded by the Royal Instructions from granting such leave, as the Appellant had not proved that the subject-matter in dispute was of the value of £300, the amount required by the Royal Instructions regulating appeals in the Colony; the papers in question of themselves being proved at the trial of no value whatever.

In consequence of the refusal by the Chief Justice, the Appellant presented a petition to Her Majesty in Council, praying for leave to appeal; and by his petition he submitted, that the Court below ought to have granted leave to appeal, inasmuch as though no value might have actually been proved in the cause, there was produced in the Court, at the hearing of the cause, one attested account of the administration of the personal estate of Mrs. *Wilson* against the Respondent, which alone amounted to £1,043. 2s. 6d., and the amount involved in the accounts and securities relating to the personal estate withheld by the Respondent was upwards of £1,000, and there was a further sum by way of costs incurred about the action, and a Bill of Discovery he had filed against the Respondent, amounting to upwards of £300, which he claimed as damages.

Mr. *Hetherington*, in support of the petition, applied *ex parte* for special leave to appeal, which their Lordships, upon the faith of the allegation in the petition as to value, granted, upon terms of the appellant giving the usual security for costs of the appeal.

Upon the appeal coming on for hearing it appeared that the allegation in the petition as to the value of the accounts and securities was unfounded in fact, and unsupported by proof; whereupon their Lordships stopped the case.

Sir *Frederick Thesiger*, Q.C., and Mr. *Leith*, were for the Appellant; and

Mr. *Wigram*, Q.C., and Mr. *Druce*, for the respondent.

The Right Hon. T. PEMBERTON LEIGH:

We shall dispose of this appeal upon a ground which we hope will in future prevent parties making *ex parte* applications, such as this, for leave to appeal, when in truth, no grounds exist to warrant such application. Leave was given by their Lordships to appeal, upon the allegation that the accounts and securities which the Appellant claimed were of the value of £300 the sum limited by the Royal Instructions, which allegation, however, now appears to have no foundation in fact. The petition to Her Majesty for leave to appeal contained an allegation as to the value of these attested accounts, which it was

alleged amounted to the sum of £1,043. 2s. 6d., and other securities to the value of £1,000. It now turns out that they were not, and are not, of the value of a single shilling. Such conduct cannot be passed over in silence. When parties make an application for an indulgence, and obtain that indulgence upon grounds which turn out not only to be unfounded, but absolutely untrue, they should know that their appeal will be dismissed with costs. The course their Lordships will, therefore, pursue in this case, without going any further, is to dismiss the appeal with costs.

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(1 Moore P.C. (N.S.) 123.)

THE Appellant carried on business as a West India Merchant in the cities of *London* and *Bristol* under the title of *Thomas Daniel* and Co. and *Thomas Daniel* and Sons. Before the year 1854, and until his decease in that year, *George Hewitt*, late of *Barbados*, planter, the Testator in the cause, was in the habit of consigning portions of the crops of sugar made on his plantations in *Barbados* to the Appellant's mercantile houses in *London* and *Bristol* for sale, and of drawing Bills of exchange on them both himself and by *Benjamin Howell Jones*, hereinafter named, his attorney, against the net proceeds of the consignments. At the decease of *Hewitt*, which occurred in *August*, 1854, there were balances due from him to both the Appellant's houses on the consignment accounts. These balances were carried over in the Appellant's books to new accounts headed, "Dr. The estate of *George Hewitt*, deceased, in account with *Thomas Daniel* and Co. Cr.": and "Dr. The estate of *George Hewitt*, deceased, in account with *Thomas Daniel* and Sons Cr."

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Hewitt by his Will, dated the 15th of *January*, 1853, devised his plantations in *Barbados* to certain trustees, including *Benjamin Howell Jones*, upon trust to conduct, keep up, and manage the plantations and hereditaments in the most advantageous manner, and to pay and apply the rents, issues and profits thereof respectively, until the period thereafter mentioned, (being the period of distribution), in manner following in payment of expenses of executing the trust, including a commission of 5 per cent. on the net annual clearances of the plantations to be retained by the trustees or such of them as should act in his affairs, as a remuneration for their or his care and trouble, and in payment of certain annuities, including an annuity of £300 to *Samuel Francis Hewitt*, a devisee entitled beneficially to two of the Testator's plantations, and for the maintenance and education of the infant Respondents, the devisees (who were entitled the beneficially to the Testator's two or other plantations), and also for raising in aid of his personal estate, not specifically bequeathed, so much money as should be required to satisfy his funeral and testamentary expenses and debts, and the liens and charges on the plantations and estates respectively, and the interest thereof until the said debts and liens were fully paid and satisfied, and to apply the moneys so raised accordingly; and

A plantation and estate in *Barbados* was devised to Executors, in trust to manage and to apply the profits, in payment of the expenses of executing the trusts, including a commission and in payment of several annuities; also to provide for the maintenance and education of certain persons, and to raise in aid of the personal estate not specifically bequeathed, so much money as should be required to satisfy funeral expenses and debts, and the liens and charges on the real estate, until the debts and liens should be fully

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paid and satisfied, and subject thereto, upon certain ultimate trusts.

D. a West India Merchant, carrying on business in Bristol and London, who had been in the habit of making advances as consignee of the Testator's estate continued, under a special agreement, but not in writing, to make similar advances to the only Executor who proved the Will, and made such advance to clear the estate from the charges, and to satisfy legacies and annuities given by the Will. The Executor having misappropriated a portion of the advances made to him by *D.*, a suit was instituted for the administration of the estate in the Court of Chancery in Barbados, in which that Court disallowed to *D.* all advances made by him, not proved to have been applied for the benefit of the Testator's estate.

Held, — First, that the Executor had power under the Will to bind the future profits of

when and so soon as all the Testator's debts and the liens aforesaid were fully paid and satisfied, so that his estate was free from debt, and in the meantime subject to the trusts aforesaid, the Testator devised his plantations in manner following, that is to say:—as to his plantations, *Warrens* and *Cane Garden*, in trust for the Respondents the five daughters of *Susanna* and *Joseph Trotman*, in equal shares, with remainder to their respective children, with provisions for their maintenance during minority; and as to his plantations, *Bloomsbury* and *Caledonia*, in trust for *Samuel Francis Hewitt*, with remainder to his children, subject to certain annuities charged thereon, and to the payment of a sum of £2,000 to two of the children of *Joseph Trotman*; and there was an ultimate limitation of the estates in favour of *Benjamin Howell Jones*, and other the executors named in the Will. The Will contained a clause whereby the Testator empowered his trustees to adjust and wind up any account pending between the Testator and any person or persons whomsoever, and he declared that his Executors should be allowed and might retain all their costs and expenses to be incurred in the due execution of the trust thereby in them reposed, inclusive of commission, during such time as they should have possession of his plantations and premises respectively; and he declared that the receipts of the Trustees or Trustee for the time being of his Will for any moneys payable to them by virtue of his Will, should effectually exonerate all persons paying such moneys to such Trustees or Trustee from any liability in respect of the application thereof.

The Testator afterwards made a Codicil to his will, by which he gave an annuity of £200 per annum to *Charlotte Double* otherwise *Jane*, and charged it on his plantations.

Benjamin Howell Jones alone qualified as Executor of the Will of the Testator, and acting in the trusts thereof, took possession of the devised plantations. Being in want of money to enable him to carry on the cultivation of the devised plantations, and for the payment of debts and annuities and other the purposes of the Will, he applied to the Appellant's mercantile houses to make the necessary advances, and he agreed to consign to them the crops or portions of the crops of sugar made on the plantations to reimburse the advances to be made by them to him. The Appellant's houses agreed to make the required advances, and did so in part by accepting, according to the usual practice of consignees of West India estates, Bills of exchange drawn by *Benjamin Howell Jones*, in the Island of Barbados, on the Appellant's houses, *Benjamin Howell Jones* consigning to them sugar from the Testator's plantations in or towards repayment of their advances.

On the 21st of July 1859, *Samuel Francis Hewitt* as devisee of two of the Testator's plantations and also an annuitant under his Will, and the infant children of *Joseph Trotman* as devisees of the two other of the Testator's plantations by their father and next friend, filed a Bill in the Court of Chancery in Barbados against *Benjamin Howell Jones*, the Trustee and Executor under the Will of the Testator, *Hewitt*, for an account of the rents and

profits, and produce of the devised estates received by him or his order, as such Executor and Trustee, and for a receiver who was appointed by an order of the Court of the 20th of *July*, 1859.

By the decree made in the suit on the 11th of *November*, 1859, the usual accounts and enquiries were directed of the real and personal estate of the Testator, and of the debts, annuities, liens, charges and incumbrances affecting the same. The Appellant in compliance with the decree, brought in the accounts of both his houses from 1854 to 1859, before the Master, and claimed a balance due from the Testator's estate to his house of *Daniel* and Co. of £4,752. 0s. 10d., and to his house of *Thomas Daniel* and Sons of £4,285. 13s. 1d., making together £9,037. 13s. 11d.

The Respondents objected to the allowance to the Appellant of any of the items contained in the Appellant's accounts, except the balance due to them from *George Hewitt* at the time of his death and the sums due on judgment against the Testator which had been assigned to the Appellant's houses as aforesaid. The Master made his report on the 7th of *December*, 1860, whereby he referred to the accounts scheduled thereto, and in effect allowed the Respondent's objections. By that report the Master found that there was due from the Testator at the time of his decease to the Appellant, the following balances, that is to say: £1,945. 7s. to *Thomas Daniel* and Sons, and £33. 15s. to *Thomas Daniel* and Co. The Appellant on the 24th of *December*, 1860, presented a petition in the cause, praying in effect, that the amounts claimed by him in his accounts might be allowed to him, and paid out of future consignments of the produce of the plantations, insisting that as consignee of the Testator's plantations, he had a lien on the crops in respect of his claim; that the Testator had by his Will authorised his Executors and Trustees to pledge such crops to raise money for the trusts thereof, and that the Appellant having advanced monies for such purposes, was entitled to a lien on such crops until the same were repaid, and was not answerable for, or bound to see to the application of the proceeds of the crops received by the Executor or Trustee of the estate.

The petition came on to be heard on the 27th of *March*, 1861, before his Honor the Vice-Chancellor, who, after observing that the report did not shew the application of the Appellant's advances, or how it was shewn that they had been expended for the benefit of the estates, or in liquidation of the debts of the Testator, directed the Master to take back his report, and to add to it a complete account between *Benjamin Howell Jones*, as Executor and Trustee, and the Appellant's houses, commencing with the sums due by the Testator at his death, and bringing it down with annual rests, after the custom of Merchants, to the discharge of *Benjamin Howell Jones* from the office of Trustee; and, in taking the accounts, the Master was directed to charge the Appellant's houses with the proceeds of the sugar consigned to them, and to give them credit for all sums advanced by them in payment of any debts due by the Testator's estate, of all advances made by them to any of the parties interested under the

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the estate, for advances made for the management of the estate, and sufficiently exercised that power by the agreement with D.

Second, That, in the circumstances of the case, the consignee was not bound to see to the application of the advances made by him.

Semble.—There may be rights on the part of consignees of West India estates, paramount to the rights both of Trustees and cestuique trusts.

An objection to an agreement, as being void by Statute of Frauds, 29th, Car. II, c. 3, by reason of not being in writing should be pleaded by the answer and cannot be entertained at the hearing of an appeal.

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Testator's Will, on the order or direction or with the sanction of *Benjamin Howell Jones*, Executor and Trustee and all sums advanced and expended in the cultivation of the estates of the Testator.

The Master by his further report dated the 22nd of *April* 1861, found that the books of the several estates had not been posted since the 31st of *December*, 1856, and from that period no Bills of exchange, drawn by *Benjamin Howell Jones*, had been entered, or any entries made of the application of the sums of money realised therefrom, so as to enable him to trace their appropriation, the day or rough books of the several plantations only showing the daily transactions of the estates, without any reference to the Bills of exchange drawn by *Benjamin Howell Jones*. That it would, therefore, be impossible for him to show to the satisfaction of the Court, how the moneys drawn by him were expended, as the only evidence he had before him that any of the Bills of exchange were drawn from the period last mentioned by him, was the attested accounts furnished by the two houses. The Master then found that payments had been made since the decease of the Testator for the benefit of his estate, by *Daniel & Sons*, amounting to the sum of £5,270. 7s. 10d., and by *Thomas Daniel & Co.*; amounting to £5,803. 13s. 3d. The Master then, after referring to the accounts scheduled to his first report, and stating that therein *Benjamin Howell Jones* was debited with the whole proceeds of the estate of the Testator, from crops and other sources, and credited for the various sums legally or equitably expended by him for the purposes of the Testator's estate, without reference to any drafts drawn on any mercantile houses, proceeded to allow the Appellant, on account of the house of Messrs. *Thomas Daniel & Sons* a total sum of £1,315. 3s. 4d., and on account of the house of Messrs. *Thomas Daniel & Co.* a sum of £1,258. 12s. 6d., and no more.

The Appellant excepted to this report. The exceptions were heard on the 21st of *June*, 1861, and by an order of that date, the Court directed that the report should be referred back to the Master, with a declaration, that the firms of *Thomas Daniel & Co.*, and *Thomas Daniel & Sons* were fully entitled to be repaid out of the future crops of the estates to be consigned to them for that purpose, all sums which they had advanced to the Trustee, and which had been in any manner expended for the benefit of the estates; and the Master was to be at liberty to keep open the question for the period of three months, to give the Appellant's houses any opportunity that they might desire for consideration. If they declined this, then the Master was to make up his account on the principle before stated, and to declare the balance which might thus appear to be due to them, for which they would be entitled to the judgment of the Court, and the Appellant's exceptions were overruled with costs.

Against this order the present appeal was brought.

Sir *Hugh Cairns*, Q. C., and Mr. *Druce*, for the Appellant.

The order made by the Court below on the exceptions is erroneous, and cannot be maintained. It proceeds on the assumption that it was the duty of the Appellant as consignee, to

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follow the advances made by his mercantile houses to the Executor and Trustee, and see that they were expended for the benefit of the Testator's estate. The Appellant is entitled to relief, first, under the agreement, and secondly in respect of his general rights and remedies as consignee of a West India estate. In the first place it cannot be denied but that the advances were made *bonâ fide*, on the faith of the agreement between Jones, the Executor and Trustee and the Appellant, and in continuation of the previous dealings between the Testator and the Appellant's houses. They were made in payment of the Executor and Trustee's drafts against consignments in the ordinary way of business for the cultivation of the Testator's plantations and estates, or in payment of charges or liens affecting the same, or otherwise for the relief of the burthens created by his Will, and the Appellant was not bound to enquire into, and ought not to be held responsible for the application of such advances. The doctrine of constructive notice deduced from the authorities cited in *Spence's "Equity Jurisdiction,"* Vol. II. p. 757, and the case of *Balfour v. Welland* (a) relied on by the Vice-Chancellor in his judgment in the Court below, is not applicable to the circumstances of this case. It is a well-established principle that a purchaser from an executor, even in the case of a mortgage, is not bound by the Executor's misapplication of the mortgage money; *M'Leod v. Drummond* (b); *Robinson v. Lowater*; (c) how, then, can it be contended that a consignee of a West India estate is bound to follow assets in the Executor's hands. Secondly, as to the rights of the Appellant as consignee, *Scott v. Nesbitt* (d), is the leading case respecting the lien of a consignee on a West India estate, that case was fully examined by this Court in *Fraser v. Burgess* (e), and though the report of it was considered to be imperfect, the principle of it, as regards the lien of a consignee on the produce of the estate, was not doubted or questioned. All the authorities on this subject are collected in the report of the case decided here, which has been followed by the Master of the Rolls, in *Bernard v. Davies* (f). In *Simond v. Hibbert* (g) a lien was established against the produce of a West India estate, in respect of supplies furnished to the estate, upon an agreement implied from the course of dealing and conduct of the parties; so in *Shaw v. Simpson* (h) a consignee, who made payments on account of an annuity on a West India estate, was held to have a lien on the compensation money awarded under the 3rd and 4th Will. IV. c. 73, the Act for the abolition of slavery. *Morrison v. Morrison* (i) carried the principle further, and gave a lien, under such circumstances on the *corpus* of the estate. The whole law, respecting the lien of a consignee of a West India estate for supplies, is accurately and fully stated by *Burge*, in his commentaries on Colonial and foreign Laws, Vol. III., tit.

(a) 16 Ves. 151.

(b) 17 Ves. 154, and cases cited in 2 Williams on Executors, Pt. III., Bk. 1. ch. 1, p. 744 (3rd Edit).

(c) 17 Beav. 592, S. C. 5 De G. Mac. & Gor., 272.

(d) 14 Ves., 438.

(e) 13 Moore's P. C. Cases, 314.

(f) 31 Beav. 429.

(g) 1 Russ. & Myl., 719.

(h) 1 You. & Coll. New Rep. 732.

(i) 7 De G. Mac. & Gor., 214, S. C. 2 Sma. & Giff., 564.

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"Tacit Hypothecs," pp. 354-5-7. Applying these principles to the facts in evidence, there can be no question that the Appellant was entitled to his full demand. The amounts advanced by him were, in fact, required for the cultivation of the estate; that is in evidence, for they were allowed to be so by *Jones*, as appears from his account with the estate, wherein he is credited with the sums advanced by the Appellant. The Appellant's accounts against the estate were furnished annually, that appears from the evidence in the case, neither *Jones*, the Executor, or the Respondents, ever questioned the accounts or the justice of the lien, while the advances were being made, though they had ample opportunity for doing so; nor had the Appellant any ground for supposing, during his dealings with *Jones*, that the accounts were not settled and approved by him as Executor and Trustee in each successive year. The accounts furnished by *Jones* to the Respondents in 1857, and adopted by them, show that the advances made by the Appellant in the previous years, were made on the credit of the estate, and not on the personal credit of *Jones*. For these reasons, we contend that, the Appellant is entitled to a lien on the crops and produce, if not on the *corpus* of the devised estates and plantations for the payment of the balances due to his mercantile houses from the Testator's estate, and the Master ought to have reported to that effect. The judgment of the Vice-Chancellor, overruling the exception to the Master's report, cannot be maintained, and we submit, ought to be overruled with costs.

Mr. *Rolt*, Q. C., and Mr. *A. Smith*, for the Respondents.

We do not dispute the authority of the cases cited respecting the lien of a consignee on the produce of a West India estate; but we insist this is not a question of that nature. The advances made by the Appellant were made to *Jones*, the Executor and Trustee, on his own personal credit, for the purposes of the Will, and not exclusively for carrying on the cultivation of the estates. The Appellant had notice of the Will, and that it gave no power to the Executor to charge the *corpus* of the estate for the payment of debts and legacies. The directions to carry on and cultivate the estate, would not warrant a sale, and if there was no power to sell, the Executor and Trustee could not charge. *Conyngham v. Conyngham* (a) *Jarman on Wills*, Vol. 2, p. 579 (3rd edit.); *Bennett v. Wyndham* (b). There is no particular law of lien in *Barbados*, nor is there any express law or custom in any part of the West Indies which makes supplies furnished to an estate a lien upon it. There must be an agreement to constitute such a lien: and the supplies furnished under such agreement, must be for the cultivation of the estate; not, as in this case, where the advances made were for the benefit of legatees and annuitants. None of the cases go to the extent urged here. We contend, that the payment of a charge on an estate, as in this case, does not, without special agreement, give the party paying it, a lien on the estate, as standing in the place of the owner of the charge paid off, and that the payment by the agent or by the direction of the Trustee, in discharge of a charge on a trust estate for the

(a) 1 Ves. 522. Belt's Supp. 221.

(b) 23 Beav. 521.

purposes of the trust, does not, without more, give the agent a charge on the trust estate. *Worrall v. Harford* (a). It is clear from the evidence in the case that the advances made by the Appellant to *Jones*, the Executor and Trustee, were for the purposes of the Will, the trusts whereof the Appellant had ample notice of, and if the repayment of those advances, or any part thereof, was made out of the produce of the estate, that would not give the Appellant a general lien on the produce for the reimbursement of his advances: he had notice of the trusts of the Will, and the Vice-Chancellor, in the Court below, was fully justified in deciding that for such advances he could have no specific lien. If there was an agreement with *Jones*, as now insisted upon, it is void as the Statute of Frauds extends to *Barbados*, such agreement ought to have been in writing. But we maintain there was no such agreement, either express or implied, and in the absence of such, even if the law of lien is to be extended to advances made under the circumstances here disclosed, there can be no right in the Appellant to charge the produce of the estate in the Executor's hands, with the amount of the advances made to him for the general purposes of the Will.

Judgment was delivered by

The Lord Justice TURNER :

This is an appeal from an order of the Court of Chancery of the Island of *Barbados*, overruling exceptions taken by the Appellant to the report of a Master of the Court, made in a suit instituted by devisees and legatees under the Will of *George Hewitt* against *Benjamin Howell Jones*, his Executor and devisee in trust for the accounts of the Testator's real and personal estates and for the appointment of a Receiver.

George Hewitt, the Testator in the cause, by his Will bearing date the 15th of *January*, 1853, appointed *Benjamin Howell Jones*, the Defendant in this suit, and several other persons named in the Will to be his Executors, and gave and devised his sugarwork plantations or estates, called *Warrens* and *Cane Garden*, and *Bloomsbury*, and *Caledonia*, in the Island of *Barbados*, and all the lands, buildings, hereditaments, stock, crops, plantation utensils and implements, and other goods and chattels to the plantations respectively belonging, unto and to the use of *Benjamin Howell Jones* and several other persons whom he had named as executors, their heirs and assigns, upon trust, to conduct, keep up, and manage the plantations and hereditaments in the most advantageous manner, and to pay and apply the rents, issues, and profits thereof respectively, until the period thereafter mentioned, in manner following,— that is to say, in payment of the expense of executing the trust, including a commission of five per cent. on the net annual clearances of the plantations, to be retained by the Trustees, or such of them as should act in his affairs, as a remuneration for their or his care and trouble; and in payment of several annuities to several persons named in the Will, and also in providing for the maintenance and education of several of the Respondents, the Plaintiffs in the suit, and also in raising, in aid of his personal estate not specifically bequeathed, so much money as should be required

(a) 8 Ves., 4.

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to satisfy his funeral and testamentary expenses and debts, and the liens and charges on his plantations and estates respectively, and the interest thereof, until the debts and liens should be fully paid and satisfied, with a direction to apply the moneys so raised accordingly, and when, and so soon as all the debts and the liens aforesaid should be fully paid and satisfied, so that his estate was free from debt; and in the meantime, subject to the trusts aforesaid, the Testator directed the plantations respectively to be held upon trusts mentioned in the Will for the benefit of the Respondents respectively. By a Codicil to his Will bearing date the 8th of *June*, 1854, the Testator gave another annuity, and directed the Trustees, or Trustee of his Will during such time as they or he should be in the possession or management of his estates, to pay the annuity concurrently with the other annuities given by his Will. And when and so soon as his Trustees or Trustee should give up possession of any of his estates under the trusts of his Will, he directed that his estates should, as between themselves, contribute to the payment of the said annuity in the proportions therein mentioned.

The Testator died on the 4th of *August* 1854; and *Benjamin Howell Jones*, the Defendant in the suit, alone proved the Will and Codicil, and alone acted in the trusts thereof.

The Appellant is a West India merchant carrying on business at *Bristol* under the firm of *Thomas Daniel & Sons*, and in *London* under the firm of *Thomas Daniel & Co.* The Testator in his lifetime consigned part of the produce of his plantations to the Appellant under his aforesaid firms, and other parts thereof to other West India Merchants in this country, and at the time of his death he was indebted to the Appellant's firms on the balance of their accounts as consignees to the amount in the whole of £2,000, and upwards. He was then also indebted to his other consignees in considerable sums. After the Testator's death the Defendant, *B. H. Jones*, his sole acting Executor and Trustee, continued to consign parts of the produce of the Testator's plantations to the Appellant's firms and other parts thereof to the Testator's other consignees, but the consignments to these latter consignees were, it appears, made in liquidation or reduction of the balances which were due to them from the Testator at the time of his death. The balances due to several of these latter consignees at the Testator's death were, it appears, paid in full by means of the consignments thus made to them by the Defendant, *B. H. Jones*. After the Testator's death the accounts of the Appellant's firms as consignees were always kept with the Testator's estate, new accounts having been opened by each of the firms upon the Testator's decease. From these accounts it appears, that the Defendant *B. H. Jones* consigned produce to the Appellant's firms to the amount of £20,566, and that the Appellant's firms paid for him, and on his account sums amounting in the whole to £27,337. Of the sums thus paid, it appears that £18,129, was paid in respect of bills drawn by the Defendant, *B. H. Jones*, upon and accepted by the Appellant's firms; £1,383. 17s. 2d. was paid in respect of a judgment debt on the *Caledonia* planta-

tion, one moiety of which judgment debt was assigned to each of the Appellant's firms; a further sum was paid in discharge of a Crown mortgage on another of the plantations; and the residue consisted of payments to or on account of the Testator's devisees, legatees, and annuitants, and for supplies, insurance, interest, and commission.

On the balances of the accounts of the Appellant's firms made up to the 31st *December*, 1859, with interest to that date, there was due to the firm of *Daniel & Sons* the sum of £4,285. 13s. 1d., and to the firm of *Daniel & Co.* the sum of £4,752. 10s. 10d. The bill in the cause was filed on the 21st of *July*, 1859, and on the 29th of *July*; 1859, a Receiver was appointed of the Testator's real and personal estates. By the decree made upon the hearing of the cause, bearing date the 11th of *November* 1859, accounts were directed to be taken of the estate and assets of the Testator, and of the crops, rents, issues, and profits of his sugarwork plantations or estates come to the hands of the Defendant, *Benjamin Howell Jones*, and of the disposition thereof, and of what debts were due and out-standing; and accounts were also directed of all the real and personal estate of the Testator, and of all the debts, annuities, liens, charges, and incumbrances affecting the same. And it was ordered, that the receiver appointed by the Court should, out of the crops, rents, profits, and produce of the said sugarwork plantations or estates, and other estate of the Testator, pay the interest on the incumbrances against the said plantations or estates and other estate which the Master should report to be due, and the several annuities given by the Testator's Will and Codicil, and afterwards the said incumbrances according to their priorities. And directions were given for ascertaining what sums would be sufficient for the maintenance of the infant Plaintiffs, and for the payment of such sums by the Receiver.

Under this decree the Appellant carried in two states of facts, claiming the above-mentioned sums of £4,285. 13s. 1d. and £4,752. 10s. 10d. against the Testator's estate, and, on the 7th day of *December*, 1860, the Master made his report in the cause, by which he found that the Defendant, *B. H. Jones*, as Executor and Trustee, was indebted to the estate of the Testator in the sum of £9,690. 10s., on account of the net proceeds of the crops and profits of the plantations and of other moneys received by him as Executor and Trustee; and with reference to the sums claimed by the Appellant, he certified that these claims had been objected to on the grounds that the amounts claimed were personal contracts of the Executor, and not authorized under the Will of the Testator, and that the Defendant, *B. H. Jones* had received considerable sums of money as the net clearances of the plantations in each year since the Testator's death, and was largely indebted to the Testator's estate on account thereof; and he further certified that he did not find any clause in the Testator's Will giving power to the Executor to raise money on the security of the estates, and that he was of opinion that the Appellant's firms were entitled to the full amount of the judgment debt assigned to them, and were also

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entitled to place the orders and drafts of the Defendant, *B. H. Jones*, Executor and Trustee, against the amount of the produce shipped and consigned by him or in their hands at the death of the Testator, and to keep alive their original account against the Testator's estate, but that they were not justified in making advances to the Defendant, *B. H. Jones*, to the large amount of £6,771. 14s. 1d., in excess of the produce shipped and the amount realized. He, therefore, allowed the Appellant only the amount of the judgment debt and of the balances due from the Testator at the time of his death to the Appellant's firms, with interest to the 29th of July, 1859, the time of the appointment of the receiver.

The Appellant then presented a petition by way of exceptions to this report. By this petition the Appellant stated that, after the death of the Testator the Defendant, *B. H. Jones*, having no money or personal estate of the Testator to enable him to carry on the cultivation of the plantations, applied to his, the Appellant's, firms to advance him money for that purpose, and to enable him to carry out the trusts of the Testator's Will, agreeing to consign the crops of sugar made on the plantations to reimburse the advances, and that the Appellant's firms agreed to do so, and accordingly did so by the Defendant, *B. H. Jones* drawing Bills of exchange on the firms, and consigning them sugar from the plantations to repay the sums paid by them as acceptors of the Bills, and towards the payment of supplies sent out by them for the plantations, and otherwise for moneys paid on account of the Testator's estate; and after setting forth in detail the payments which had been made by the Appellant's firms, the Appellant by the petition insisted that the Master was not justified in disallowing his claims; that his firms, as consignees of the Testator's plantations, had a lien on the crops of the plantations in respect of their claims; that the Testator having devised his plantations to trustees, including the Defendant, *B. H. Jones*, who had alone acted in the trusts, thereby authorized the Defendant, *B. H. Jones* to pledge the crops of the plantations to raise money for the purposes of the trusts, and that he (the Appellant) having advanced money for those purposes, was entitled to be repaid such moneys out of the crops of the estate, and was entitled to a lien on such crops until the same were repaid; and further, that he was in no way answerable for the application of the proceeds of the crop which came to the hands of the Defendant *B. H. Jones*, he not being bound to see, and it being impossible for him to see, to the application thereof. The petition, therefore, prayed that the Master might be directed to allow the items in the accounts of the Appellant's firms which had been disallowed by him; and that the receiver might be directed to consign the crops of sugar of the Testator's plantations to the Appellant's firms until the respective balances due to them as consignees were fully paid and satisfied. This petition was in the first instance supported only by an affidavit of *Thomas Louis*, the Appellant's attorney in the Island, deposing that the facts stated in the petition were true, to the best of his knowledge and belief; but the petition having been met by

affidavits on the part of the Respondent, which were to the effect that the Defendant, *B. H. Jones*, had some moneys in hand belonging to the Testator's estate at the time of his death, and had besides received the offal crops of the estate from that time until the appointment of the receiver, a further affidavit was made by *Thomas Louis*, on the part of the Appellant, by which he deposed, that the Appellant's firms gave no personal credit to the Defendant, *B. H. Jones*, in respect of the advances they made for the benefit of the Testator's plantations, but that they looked to be repaid such advances out of the sugar made on the plantations, and which the Defendant, *B. H. Jones*, as Executor and Trustee, agreed with the Deponent as the attorney and agent of the Appellants, to consign to the Appellant's firms in payment of the advances made to the Defendant, *B. H. Jones*, as such Executor and Trustee, for the benefit of the Testator's estate.

By an order made on this petition, and bearing date the 27th of *March*, 1861, the Court, after taking notice that no less than £18,129, appeared to have been advanced to the Defendant, *B. H. Jones*, on his drafts by Bills of exchange, and that no mention was made in the report of the application of that sum, or how it was shown to have been expended for the benefit of the estates, or in liquidation of the debts of the Testator, ordered that the Master should take back his report, and add to it a complete account between the Defendant, *B. H. Jones*, as Executor and Trustee, and the Appellant's firms, commencing with the sum due by the Testator at his death, and bringing it down with annual rests, after the custom of Merchants, to the discharge of the Defendant, *B. H. Jones*, from his office as Trustee: and that in this account the Master should charge the Appellant's firms with the proceeds of the sugars consigned to them, and give them credit for all sums advanced by them in payment of any debt due by the Testator's estate, and for all advances made by them to any of the parties interested under the Testator's Will, on the order or by the direction, or with the sanction of the Defendant, *B. H. Jones*, and for all sums advanced and expended for supplies, and in the cultivation of the estates.

In pursuance of this order, the Master made a further report, dated the 26th of *April*, 1861, by which, after stating that the Appellant's Solicitors had declared their inability to give any further account, or to furnish any information as to the application of the moneys drawn out of the Appellant's hands by the Defendant, *B. H. Jones*, he certified that it was impossible to show how the moneys drawn by the Defendant *B. H. Jones*, were expended, and after stating particulars of sums paid by the Appellant's firms to and on account of the annuitants and devisees, and for debts and supplies and insurance, he added that the proceeds of the sugars consigned to the Appellant's firms were far more than sufficient to meet these payments and charges, and that the balance of such proceeds and sums far exceeding such balances had been drawn by the Defendant, *B. H. Jones*, from the Appellant's firms, and the appropriation of them

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could not be traced. He further stated that, the Defendant *B. H. Jones*, had been debited with the whole amount realized by the sales of the sugars consigned, as well as by the offal crops of the plantation during the period he acted as Executor, and had been credited with the payments which had been made to the parties interested under the Will by his sanction, direction, or orders, and he concluded his report by referring to an account in which he adjusted the claims of the Appellant's firms in the same mode in substance as he had adopted in his former report. Exceptions were taken by the Appellant to this report. They were in, substance, to the effect, that credit had not been given to the Appellant's firms for all the sums which had been paid upon the bills drawn by the Defendant, *B. H. Jones*, and in discharge of the incumbrances and charges against the Testator's estate.

Upon the hearing of these exceptions the following order was made:—The Court directed the reports to be referred to the Master. It declared the Appellant's firms to be fully entitled to be repaid out of the future crops of the estates to be consigned to them for that purpose, all sums which they had advanced to the Trustee, and which had been in any manner expended for the benefit of the estates; and after referring to the Appellant's Solicitors having declared their inability to furnish further information, it directed that the Master should be at liberty, to keep open the question for the period of three months, to give an opportunity for reconsideration, and, if this was declined, the Master was to make up his account on the principle before stated, and declare the balance which might thus appear to be due and for which the Appellant would be entitled to the judgment of the Court. In conclusion, the Court ordered the exceptions to be overruled, and with costs.

It is from this order the present appeal has been brought. The petition of appeal prays not only that the order may be reversed and the items claimed by the Appellant in the accounts of his firms allowed, but that the receiver may be directed to consign the crops of sugar of the Testator's plantations to the Appellant's firms, until the respective balances due to them as consignees are fully paid and satisfied.

The case was very fully and ably argued before us. It was contended on the part of the Appellant, that he is entitled to the relief sought by this appeal by virtue of the special agreement entered into on his part with the Defendant *B. H. Jones*, or, failing his title under that agreement, by virtue of the rights and remedies to which, as was insisted on his part, all consignees of West India estates are entitled, independently of any special agreement. On the part of the Respondents, on the other hand, both the existence and validity of the alleged special agreement, and the rights and remedies claimed on the part of the Appellant to belong to consignees of West India estates independently of special agreement, were disputed and denied.

The case, therefore, presents two subjects for consideration: the special agreement, and the general rights and remedies of consignees of West India estates. It will be convenient first, to

consider how the case stands as to the special agreement. As to existence of this agreement their Lordships are fully satisfied upon the evidence before them, that the agreement was, in fact, made and entered into. They see no reason to doubt the evidence given by *Louis* on the part of the Appellant, or the fact of the agreement having been made as deposed to by him. They find nothing on the part of the Respondents which in any way contradicts that evidence, and they cannot but think it highly improbable that such large advances should have been made by the Appellant without any agreement having been entered into respecting them. So far, therefore, as this agreement is concerned, the case appears to their Lordships to resolve itself into the question of its validity. That question depends upon two points: first, whether, according to the true construction of the Testator's Will, the Defendant, *B. H. Jones*, had power to bind the future profits of the plantations by such an agreement; and, secondly, whether assuming that he had this power, he has well and effectually exercised it. First, then, as to the construction of the Testator's Will. It is to be observed that the primary object of the Testator was that his plantations should be kept up, conducted, and managed in the most advantageous manner. Not only is this trust in terms declared by the Will, but every purpose of the Will—the payment of the expenses of the trust, of the annuities, of the allowances for maintenance, of the Testator's general debts, and of the liens and charges on the plantations—depends upon that trust being fully carried into effect. The Will, therefore, ought plainly to be so construed as to give full effect to these purposes. Looking, then, to the dispositions of the Will, there is not, it is to be observed, any trust of the surplus of the rents and profits after answering some only of the special purposes designated by the Will, but the whole rents and profits are dedicated to all the special purposes which are pointed out. The devisees of the estates take subject to those purposes. The intention, therefore, must have been to vest in the Trustees full power over both the immediate and the future rents and profits, and that this was the intention is made clear by the trust to raise money to supply the deficiency of the personal estate for the payment of the debts. It is true indeed, that this trust does not in terms extend to all the purposes of the Will, and does not in terms embrace the raising money for keeping up and managing the plantations: but this latter purpose, though not in terms expressed, must, as it seems to their Lordships, almost necessarily be implied; for unless the plantations were so kept up, the trust for raising money for the payment of the debts could not be made available.

These considerations present themselves upon the face of the trusts declared by this Will. They become of much greater weight when the subject to which those trusts apply is taken into consideration. Plantations in the West Indies cannot be regarded in the same light as landed estates in England. The cultivation of them is, as was repeatedly said by Lord *Eldon*, a species of trade. In all questions respecting them considera-

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tions of trade and commerce, quite foreign to the cultivation of landed estates in this country, present themselves. They cannot be carried on without the intervention of consignees and agents in this country, and the cases are rare indeed in which they can at all be carried on without advances being made by those consignees and agents to be reimbursed out of the future proceeds. In the ordinary course of business the cultivation of a West India estate can no more be carried on without advances being made by consignees, and being so reimbursed, than trade can be carried on in this country without debts being contracted and being paid or secured. It may be as well to add on this part of the case, that this difference between West India estates and landed estates in this country does not enter merely into questions relating to the conduct and dealings of Trustees, but that it goes much further, and affects the construction of Wills and instruments relating to the estates, as was held in the case of *Lushington v. Sewell* (1 Sim. 435) by the late Sir Anthony Hart, a Judge eminently acquainted with the law and practice relating to estates in the West Indies. Their Lordships feel bound therefore, both by authority and upon principle, to apply these considerations to the construction of this Will, and, so applying them, they have come to the conclusion that, according to the true construction of this Will, it was within the power of the Defendant, *B. H. Jones*, to bind the future profits of these plantations by the agreement entered into by him with the Appellant's firms.

Secondly, then, did the Defendant *B. H. Jones*, well and effectually exercise this power by the agreement entered into by him? It was insisted, on the part of the Respondents, that he did not, and that the agreement, not having been reduced into writing, was void by the Statute of Frauds; but their Lordships find no trace in any of the proceedings of the Statute having been set up in answer to this claim, and they think that this objection, even if well founded, could not be entertained, at all events at this stage of the case. They think, however, that the objection is not well founded, the agreement having, in their judgment, been in part performed.

Their Lordships, therefore, are of opinion, that, by virtue of the special agreement entered into with the Defendant, *B. H. Jones*, the Appellant's firms are entitled to be paid out of the Testator's estate all the sums advanced by them respectively, with interest thereon; but in holding this they desire to be distinctly understood as proceeding upon the ground, that in their opinion the agreement was *bonâ fide* made, and *bonâ fide* acted upon on the part of the Appellant's firms. They collect from the reasons of the judgment printed in the Appendix, that the Court in *Barbados* entertained a different opinion upon this point, and considered that the large amount of the drafts drawn by the Defendant, *B. H. Jones*, upon the Appellant's firms, put them upon enquiry, and justified the conclusion that they were aware that the Defendant, *J. H. Jones*, was misapplying the moneys which were drawn for by him. If their Lordships had seen their way to this view of the case they would not have hesi-

tated to affirm this order, but the facts of the case do not appear to them to warrant this conclusion.

It is not even suggested that the Appellant had any knowledge that the Defendant, *B. H. Jones*, was misapplying the Testator's assets, or any ground for suspecting any such misapplication, except in so far as the large amount of the Defendant's drafts might induce such suspicion. But, according to the agreement entered into with the Appellant, the advances to be made by him, and which were made by means of these drafts, were to be not merely for the cultivation of the plantations, but generally for the purposes of the Testator's estate; and their Lordships can see no ground for assuming that the Appellant had any reason to suspect that his advances were not applied for those purposes. The fact of the other consignees being paid off would naturally lead to that conclusion, and the regular payments to and on account of the annuitants and devisees could not but induce the belief that the Testator's estate was being duly administered. It is remarkable, too, as was well pointed out by Mr. *Druce*, in the course of his argument, that when the plantation accounts are examined the amounts expended on the plantations in several if not all, the years of the Defendant's management beyond the offal crop, exceeded the sums drawn from the Appellant's firms in those years.

This part of the case, indeed, was scarcely, if at all insisted upon on the part of the Respondents, in the course of the argument at the Bar, and their Lordships find themselves quite unable to adopt the opinion of the Court in *Barbados* upon it. Their Lordships collect from the order under appeal that in the opinion of the Court in *Barbados*, the Appellant was bound to see to the application of the moneys advanced by him under the agreement; but however this may have been in the view which the Court in *Barbados* took of the case, their Lordships are of opinion, that as the case really stands no such obligation rested on the Appellant. The moneys advanced by him were not meant or intended to be applied to any defined or special purpose. They were of necessity to be applied at the discretion of the Trustee to whom they were advanced. To hold that the Appellant's firms were bound to see to the application of these advances would in effect render it impossible that any such advances could be made. The principle which governs the cases as to the obligation of seeing to the application of money applicable to the payment of debts seems to their Lordships to settle this question. The Appellant, then, being, in their Lordship's judgment, entitled to relief by virtue of the special agreement, it is unnecessary for their Lordships to say how the case would in their opinion, have stood independently of that agreement; but it may be right to add, that they are not satisfied that the rights of consignees of estates held in trust ought in all cases to be affected by the defaults of the Trustees. The case of *Simond v. Hibbard* (1 Russ. & Myl., 719) seems to have an important bearing upon this point. There may be rights on the part of the consignees paramount to the rights both of the Trustees and the *cestui qui trusts*; but their Lordships desire to be understood

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as not intending to give any final opinion on this question.

Their Lordships, therefore, will humbly recommend Her Majesty to reverse the order complained of by this appeal, and to declare that no order ought to have been made either overruling or allowing the exceptions taken by the Appellant to the Master's report, but that the accounts of the Appellant's firms of *Daniel & Son*, and *Daniel & Co.*, as consignees ought to have been, and ought to be taken, and that in taking such accounts the Appellant's said firms respectively ought to have been, and ought to be allowed all sums of money paid by them respectively to, or by the order of the defendant, *Benjamin Howell Jones*, as Executor or Trustee of the Testator's Will, in respect of his drafts against consignments, or in the ordinary way of business, for the cultivation of the Testator's plantations or estates, or in or towards payment of any charges or liens affecting the plantations and estates, or any of them, or otherwise for the purposes of the Testator's Will and Codicil, or either of them, and that what, upon the taking of the said accounts, shall be found to have been the balances due to the Appellant's firms at the time of the appointment of the receiver in the cause ought to have been and ought to be allowed to the Appellant against the Testator's estate, and ought to have been, and ought to be paid to the Appellant out of such estate, with interest upon such balances at the usual rate, and according to the usual course until payment thereof; and to order that the case be remitted to the Court in *Barbados*, with directions to carry the above declarations into effect; and further to order that the Appellant's cost of the exceptions, and of this appeal be added to the amount which shall be found payable to him, and be also paid out of the Testator's estate, with liberty to the Appellant to apply to the Court in *Barbados*, respecting the payment to him, and otherwise as he may be advised.

It is, as above-mentioned, asked by the petition of appeal, that the receiver may be directed to consign the produce of the plantations to the Appellant, but their Lordships do not think that such an order could properly have been made upon the hearing of the exceptions, and they, therefore, make no order on this part of the petition. The Appellant, if so advised, may apply to the Court in *Barbados* for this part of the relief asked by the petition of appeal.

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Barbados Insolvent Debtors Act, No. 234, of 1846—Adjudication of Bankruptcy in England—Certificate—Statute 12 & 13 Vic. c. 106, s. 200—Fraud—Jurisdiction of Colonial Court to commit Insolvent notwithstanding English certificate.

Although an adjudication in Bankruptcy, followed by a certificate of discharge in *England*, under the Bankrupt Laws, has the effect

* *Present*:—LORD ROMILLY (MASTER OF THE ROLLS), SIR FITZ-ROY KELLY (LORD CHIEF BARON OF THE EXCHEQUER), SIR JAMES WILLIAM COLVILLE, and SIR EDWARD VAUGHAN WILLIAMS,

of barring any debt which the Bankrupt may have contracted in any part of the world, and of putting an end to any claim; such proceedings do not supersede the authority of the Court at *Barbados* to inquire into frauds and offences committed against the law of Insolvent Debtors in that Island, in a proceeding had there previous to the adjudication of Bankruptcy in *England*, the Insolvent having again placed himself within the jurisdiction of that Court.

G., a trader in the Island of *Barbados*, having left the Island in embarrassed and suspicious circumstances, was, under the Island Act, No. 234, of 1846, adjudicated an Insolvent, and his estate and effects administered under that Act. *G.* afterwards came to *England*, and was adjudicated a bankrupt for a debt contracted in *England*, and obtained a certificate of conformity under the Imperial Statute, 12 & 13 Vic. c. 106, s. 200, discharging him from all debts due by him when he became a Bankrupt. *G.* returned to *Barbados*, when the Court there, before whom the original proceedings in Insolvency were had, at the instance of the opposing creditors, sentenced him, under the Island Insolvent Act, to eighteen months' imprisonment for fraud committed against the provisions of that Act:—

Held (affirming the Order of the Court), that the Insolvent Court of *Barbados* having acquired jurisdiction in the first instance in the matter of the Insolvency retained such jurisdiction, so as to render *G.* on his return amenable to that Court for fraudulent acts committed by him, and the sentence passed on him confirmed.

THIS was an appeal from Order of the Court of Common Pleas in the Island of *Barbados*, exercising jurisdiction in matters of Insolvency under the Acts of the Island, Nos. 234 and 332 of 1846, (a) whereby the Appellant was ordered to be imprisoned in the common gaol for a period of eighteen months (1.)

The Appellant had for many years previous to the year 1856 carried on business in *Barbados* as a Trader and Merchant, having dealings as such with persons resident in *England*. In the month of July in that year he left *Barbados* for *England*.

At that time it appeared he was indebted to the extent of £50,000. On the 29th of April, 1857, the Appellant was declared an Insolvent Trader at *Barbados*, within the *Island Act*, No. 234, of 1846, and a prosecution of Insolvency was directed by

(1) The section of the Act, No. 234, of 1846, empowering the court to give such a sentence, is as follows:—

20. And be it enacted, "That in case it shall appear to the said Court that such Insolvent shall have contracted any debt fraudulently, or by means of a breach of trust, or by means of false pretence, or without having had any reasonable or probable expectation at the time when he contracted it for paying the same, or shall have lived extravagantly and beyond his proper means, or shall have fraudulently, or by means of any false pretence obtained the forbearance of any debt by any of his Creditors, or shall have lost by gambling within six months previous to his Insolvency, the sum of £50 sterling or upwards, or shall have put any of his creditors to any unnecessary expense by any vexatious or frivolous

(a) *Sic* in original; but correctly, No. 234 of 1846, and No. 332 of 1853.

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the Chief Justice against him, whereupon the real and personal estate and effects of the Appellant became vested in the Official Assignee at *Barbados*. The Appellant having left a duly constituted Attorney to represent him, the Official Assignee forthwith applied to him for information. In answer to such application, it appeared that the Attorney was totally unacquainted with the Appellant's affairs, that the Appellant had left no Books or papers with him, and that he did not know the extent of the Appellant's assets. The Official Assignee having obtained the keys of the Appellant's desks at his counting house, found them filled with papers in a state of confusion; no arrangement whatever; and no Books of any description from which information respecting his business transactions or state of his affairs could be gathered, nor from which any correct account could be furnished against any person indebted to him for advances on produce or otherwise. In order to obtain information as to the Appellant's affairs, the Official Assignee examined several witnesses, and ascertained that the Appellant had been carrying on an extensive business in the Island, drawing Bills of Exchange on one Merchant in *Liverpool* alone in the course of eight months, from the 27th of December, 1853, to the 26th of August, 1854, for no less a sum than £37,857. It was further ascertained from Mr. *Reid*, who had been the Appellant's Clerk for twelve years, that the Appellant had kept no regular Books; that his accounts had been made out by reference to the stumps of the cheque books; that the balances due from and to parties and the prices of produce &c., were furnished by the Appellant to him from private memoranda kept in small Books in pockets or drawers; but the Appellant's Attorney was unable to say what had become of such small Books. Mr. *Outtram*, another of the witnesses examined by the Official Assignee, who was one of the Trustees of the Will of the Rev. *J. Brathwaite* (the father of the Appellant's wife), deposed that from information received by the Appellant by the mail on the 6th of May, 1857, he had caused an entry to be made in the Books of the Rev. *J. Brathwaite's* estates of two execution debts (one for \$2,000, and the other for £8,000 sterling) as due from the estate to the Trustees of the Appellant's marriage settlement.

defence or delay to any suit for recovering any debt or sum of money due from such Insolvent, or shall have kept, or caused to be kept, any false Book or Books, or made, or caused to be made, any false entry or entries, or withheld, or caused to be withheld, any entry or entries from, or wilfully altered or falsified or caused to be altered or falsified any Book or Books, papers or writings; or that such Insolvent has fraudulently, with intent to diminish the sum to be divided among his Creditors, or to give an undue preference to any of the said Creditors, discharged or concealed any debt due to or from the said Insolvent, or made away with, charged, mortgaged, or concealed any part of his property of what kind soever; then it shall be lawful for the Court to order such Insolvent to be imprisoned in the common gaol for a period not exceeding two years, as the Court shall direct, to be computed from the date of such order, and to be discharged from his debts after the expiration of such imprisonment."

On the 30th of November, 1857, the Official Assignee made his first report, and, after stating the result of his inquiries reported with respect to the execution debt of £8,000 sterling, that the Rev. *C. C. Gill*, the Trustee of the Appellant's marriage settlement, since deceased, declared that he was not aware of the existence of such execution debt in his favour, and that he had never had any accounting with the Rev. *J. Brathwaite*, and the Official Assignee further stated his belief that the Appellant, "no doubt being well aware that he was in Insolvent circumstances at the time, and had been so since the year 1847, wished by making over the £8,000, and also certain property known as *Hastings House* and land, to the Trustees, to put them out of the reach of his Creditors, and to ensure a future provision for his family;" He added: "As far as I can learn, his liabilities at the present moment are £40,000. From the absence of all Books, I cannot tell when the various debts were incurred, but the probability is that they are, most of them, previous to 1853, when he got his father-in-law to settle the amount due to him upon his daughter, and that in reality he paid off no debts, but was shifting them from the shoulders of one party to the other."

On the 3rd of May, 1858, the Official Assignee made his second report, wherein, among other things, he stated "numerous claims and proofs have been filed since my last report, which, with those already reported, make the liabilities to date amount to £48,897 10s.; among these are two debts said to be owing to the estate of the Rev. *J. Brathwaite*, deceased. One is put in by the Executor and Executrix, including transactions prior to his death; the other by the Trustees, under his Will, comprising debts and credits since his death." The Official Assignee further stated that Mr. *Pitcher*, the Accountant who posted *Brathwaite's* Books, had, upon examination, admitted "that no entry of any lien against the estates was made until May, 1857, when he made it by Mr. *Outtram's* request, from memoranda put out by Mr. *Howard Gill*, the Appellant."

On the 28th of November, 1859, the Official Assignee made his third report, and stated "that the accounts proved by the Executors and Trustees of the Rev. *J. Brathwaite* for the respective sums of \$11,491·5 and \$1,179·50 have been withdrawn, the parties acknowledging them to be incorrect. Great difficulty, "having been experienced in dealing with the judgment debt of £8,000, which had been confessed by the Rev. *J. Brathwaite* to Mr. *Gill's* Trustee under his marriage settlement," the matter was referred to the arbitration of the Attorney and Solicitor-General, who, by their decision, brought "the estate of the Rev. *J. Brathwaite* in debt for the sum of \$25,202·25, instead of Mr. *Gill* being in debt \$12,671."

On the 9th of September, 1859, the Official Assignee filed a Bill in Chancery against *C. C. Gill*, the Trustee of the Appellant's marriage settlement, to set aside the conveyance of *Hastings House* and land, and by a decree made in that suit, dated the 30th of March, 1860, it was declared that the conveyance for the place called *Hastings House*, with the land thereto belonging, was fraudulent and void against the Creditors of the

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Appellant, and ordered to be cancelled; and a decree was made that a conveyance of the estate should be executed to the Official Assignee for the benefit of the Appellant's creditors.

Previously to the declaration of Insolvency in *Barbados*, and in the month of December, 1856, the Appellant then being in *London*, called upon the Respondents, and stated that there were several Bills of Exchange, which had been drawn upon him which he was unable to meet, but that he expected remittances from *Barbados*, which had not arrived. The Appellant at the same time asked the Respondents to take up the Bills, and promised to pay them the money on the 5th of January, 1857. The Respondents thereupon took up two of the Bills, and gave in cash £325 for them, and they gave their acceptances to the Appellant at thirty days for, and so as to cover the remaining Bill. The Bills were not met by the Appellant at maturity, and the Respondents had to retire them.

The Respondents brought an action against the Appellant in the Court of Exchequer in *England* to recover the amount due to them in respect of the Bills so taken up by them, and obtained judgment therein for £1,043 13s. 9½d., principal and interest.

On the 2nd of April, 1857, the Appellant was arrested for a debt due by him in *England* to one *Trollope Montefiore* and committed to the Queen's Prison, and whilst there received information that he had been declared an Insolvent Trader in the Island of *Barbados*.

On the 9th of September, 1857, the Appellant was adjudged Bankrupt in the Court of Bankruptcy in *London*, under the *Bankruptcy Law Consolidation Act*, 1849, upon the petition of one *Hall*, as Indorsee for value, and holder of an overdue Bill of Exchange accepted by the Appellant, payable in *London*.

The Appellant applied to the Court of Bankruptcy in *London* for his discharge from custody; his application was opposed by the Respondents and by *Montefiore*, and the further consideration thereof was adjourned to enable the Respondent, *Rat-tray*, to present a petition to annul the adjudication of Bankruptcy, on the ground that the alleged debt due to *Hall* was collusive, and that the Appellant was not a Trader within the meaning of the law relating to Bankrupts, and that the debts of the Appellant to the Respondents and to other persons had been fraudulently contracted by the Appellant.

On the 28th of October, 1857, upon the application of the Appellant, the Court of Bankruptcy ordered his release from prison at the suit of the Respondents and the other detaining Creditors, when *Outtram*, a Creditor of the Appellant for £995, was chosen by the Appellant's Creditors, including the Respondents, Assignee of the estate and effects of the Appellant, and on the 16th of August, 1862, a certificate of conformity of the third class, under the *Bankrupt Law Consolidation Act*, 1849, was granted by Mr. Commissioner *Fane* to the Appellant.

On the 2nd January, 1865 (the Appellant having returned to *Barbados*), an application was made to the Chief Justice to fix a day for his final examination, under the Insolvency, and the 31st of January, 1865, was fixed accordingly. The Respond-

ents gave notice to the Appellant that it was their intention to oppose his final discharge, and filed nine allegations, of which the fifth was subsequently withdrawn. The Appellant filed an affidavit, verifying the certificate of discharge granted to him by the English Court of Bankruptcy.

The Appellant appeared and objected to the jurisdiction of the Court, submitting that the certificate of discharge of the English Bankruptcy Court ousted such jurisdiction, but the Chief Justice (*R. Boucher Clarke*,) ruled the contrary, and examined the Appellant and other witnesses in the matter of the Insolvency, the effect of which is stated in the judgment of the Chief Justice.

On the 7th of February, 1865, the Chief Justice gave judgment, the material part of which was in these terms:—He observed that, “Before the filing of the allegations under consideration, the Court of Bankruptcy in *England* granted the Appellant a certificate of conformity. This he produced in Court, in order to found on it an objection to any proceeding by this Court with the allegations, contending that the Court here was by the certificate deprived of all jurisdiction with respect to his Insolvency. As,” continued the Chief Justice, “I felt no doubt on the point, I allowed the allegations to be proceeded with, stating that, it being a new question, I would reconsider it, and give my decision on a future day; and that if I should alter my opinion the Insolvent should have the benefit of it. The first inquiry then is, what is this certificate? It is granted under the authority of the 198th and other clauses of the 12 & 13 Vict. c. 106, and is of the third class. The 200th clause of this Statute ‘discharges the Bankrupt from all debts due by him when he became a Bankrupt, and from all claims and demands made provable under the Bankruptcy;’ that is the Bankruptcy in *England*. This is the extent of its effect; and it may be conceded that if there had not been any adjudication here, constituting him an Insolvent Trader under the provisions of the *Insolvent Traders Act* of this Island, prior to the proceedings taken in *England* to make him a Bankrupt there, the certificate would have been a good plea in bar to an action brought against him in this Island for any debt provable against him under the Bankruptcy in *England*. But the fact being, that, before any such proceedings were had in *England*, he had been duly and legally adjudged to be an Insolvent Trader in *Barbados*, the questions to be decided are: What is the effect of such an adjudication here?—and is the Court here ousted of its jurisdiction over the Insolvent by reason of his having, subsequent to such adjudication, been made a Bankrupt in *England*, and obtained from the Court of Bankruptcy there the certificate of conformity which he produced? It was not, and could not have been contended that there was any error in the proceedings making him an Insolvent here. The immediate effect of the fiat of Insolvency issued against any trader is thus set forth in the Act, No. 234, of 1846, the 7th clause of which enacts:—‘That from and immediately after any such adjudication of Insolvency, pursuant to the provisions of this Act, the real and personal estates and

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this Colony, and was adjudicated an Insolvent. But it by no means follows that, even under those circumstances, the jurisdiction of this Court would have been ousted, for then the position of the two Courts would have been reversed; the property here would have been subject to the English Court, and this Court would have been as powerless as the English Court was in all matters save one; and that the very one which it is attempted by this motion to take now from the cognizance of this Court, viz., the conduct of the Insolvent; for the question of granting a certificate is a question of conduct. No claim was ever made by the Court in *England* to interfere with the proceedings here, of which it was well aware; or to deal with the property of the Insolvent, which it knew was by law vested in the Official Assignee here; it dealt only with what was within its power—the Bankrupt himself. In like manner, the Court here has hitherto dealt with what was within its reach—the Insolvent's property; and I am at a loss to know what there is, now that he has voluntarily placed himself within its jurisdiction, to prevent its dealing with his person. If he is subject to any one clause of the Act, he is subject to all, unless he can shew a special and sufficient exemption. This he has failed to do; it is not to be found in any Act of Parliament or local law; it does not exist in the Court of Bankruptcy in *England*, nor in its certificate, for that relates solely to debts; and the question raised and argued is one of jurisdiction, the avowed object of the motion made being—to free the Insolvent from the authority of this Court, in respect to the penalties of the Law of Insolvency here. There are one or two points with respect to the certificate itself which must be considered. First, as to the mode in which it is produced before the Court; and secondly, as to the means by which it was obtained. With regard to the first point, I have already stated the reasons for allowing the question it was intended to raise to be argued simply on its production; but as the effect of the certificate and the exemption it gives is wholly statutory, so is the mode in which the party must avail himself of it; and this is pointed out by the 205th section of the Statute, 12 & 13 Vict. c. 106. It must be done either by plea or motion; and if by plea, the form given by the Act must be adopted. In *Gowland v. Warren* (1), it was held that the certificate must be specially pleaded, and could not be given in evidence under the general issue; Lord *Ellenborough* stating that ‘Bankruptcy in the Defendant does not shew that the Plaintiff never had any cause of action, or that his demand has been cut down. The debt still exists, and the certificate only operates as a special discharge from it, under the Statute. The party, therefore, can avail himself of this discharge only in such manner as the Statute has provided.’ This shews that the certificate can only be made available by being pleaded in the manner prescribed by the Act; that its effect is confined to the debts of the Bankrupt, and that it has no other operation; it cannot, therefore, be held to oust this Court of its authority, acquired prior to the Bankruptcy in *England*, to deal with the Insolvent and his property under the

(1) 1 Camp. 363.

Act of this Colony. Secondly, as to the means by which it was maintained. The Insolvent, on his examination before this Court, proved that the adjudication of Bankruptcy against him in *England* was obtained by fraud and false swearing, to which he was himself a party; for he swore that one *Parker*, who was a fellow prisoner with him in the Queen's Prison, was the person who appealed as petitioning creditor; that the debt he deposed to was on a Bill of Exchange given by him to *Parker*; that there was no consideration for this Bill, there being no debt due by him to *Parker*; and that it was on this fictitious debt that he was made a Bankrupt, and the proceedings carried on against him, by means of which he ultimately obtained the certificate he produced in support of the motion for his discharge. Now, the 201st section of the Statute, 12 & 13 Vict. c. 106, provides 'that no Bankrupt shall be entitled to a certificate of conformity under this Act, and any certificate, if allowed, shall be void'.....' if any person having proved a false debt under the Bankruptcy, such Bankrupt being privy thereto, or afterwards knowing the same, shall not have disclosed the same to his Assignees within one month after such knowledge.' This section, therefore, on his own evidence, not only disentitled the Bankrupt to receive a certificate, but, even where he has succeeded in obtaining it under such circumstances, renders it void. The words of the Act are, 'having proved a false debt under the Act,' and they must apply to all debts which are proved as debts of the Bankrupt; and, *à fortiori*, to the most important of those debts, that of the petitioning Creditor. The Insolvent, therefore, has himself proved that, under this section of the Statute, the certificate is void and of none effect. But setting aside this section, and assuming that there was no enactment to that effect, it is clear, and was so decided in the case of *Horn v. Ion* (1), that it is a good answer to a plea of Bankruptcy, that the certificate was obtained by fraud, 'on the general principle that fraud vitiates all contracts and instruments.' In the case of *Vincent v. Brady* (2), where a certificated Bankrupt was arrested for a debt due before his bankruptcy, and obtained a rule to shew cause why he should not be discharged out of custody on entering a common appearance in pursuance of the Statute, affidavits were received and read on shewing cause that the certificate was obtained by fraud, one of which was made by the Defendant himself in another cause, setting forth the fraudulent means by which the certificate was obtained; and "the Court were clearly of opinion that the Defendant was not entitled to his discharge, as it plainly appeared, from his own affidavit, that the certificate was obtained by fraud." The fraud proved by the Insolvent in this case affects every proceeding in the Court of Bankruptcy in *England*, for it lies at the base of the suit, the adjudication being founded on a fictitious debt, falsely sworn with the knowledge and by the contrivance of the Insolvent to be a true one; the object manifestly being to pass through the Court there, and obtain the certificate produced, in the hope that it would be a bar to the jurisdiction of this Court. Lastly, it is impossible

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(1) 4 B. & Ad. 78.

(2) 2 H. Bla. 1.

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not to see the evils to which such a construction of the effect, even of a valid certificate, would lead, if it were allowed by the Court. As soon as a Trader was made an Insolvent in a Colony, if he felt that he was not entitled to a certificate there, he might betake himself to *England*, and by means of the facilities which it would seem exist in the Court there, obtain a certificate, and return discharged from his debts, and freed from the jurisdiction of the Court of the place of his trading and domicile, where alone existed the evidence necessary to shew the true facts of his Insolveny. This is no imaginary evil. It is on his own shewing that the Insolvent contrived by means of fraud, and with the help of the false oath of another, to give the Court in *England* jurisdiction to declare him a Bankrupt there; and that he thus obtained his certificate; and he has not hesitated, in order to obtain what he supposes to be the benefit of such certificate in this Court, to swear falsely in the affidavit he made in support of it, that I was, on the petition of a Creditor in *England*, made a bankrupt there." Upon the grounds, and for the reasons given, I have come to the conclusion that the certificate produced by the Insolvent, if valid, can in no degree deprive this Court of its jurisdiction over the Insolvent. I am of opinion that such certificate has been fraudulently obtained, and is void under the Statute, as well as on the general principle applicable to all fraudulent documents. I am also of opinion that this Court had primary, and now retains full jurisdiction to deal with the Insolvent according to the law of the Colony relating to "Insolvent Traders" (1). Upon the merits he found that six out of the nine allegations filed by the Respondents were proved, which six allegations were as follows:—Second, that the Insolvent's Books were not kept in a clear and correct manner, so as to enable his creditors to obtain a complete knowledge of the state of his affairs, although his debts exceeded £500. Third, that a full and proper balance sheet and schedule had not been lodged by the Insolvent in the office of the Official Assignee. Fourth, that the Insolvent contracted the debt of the Respondents without having any reasonable or probable expectation at the time when he contracted it of paying the same. Sixth, that the Insolvent fraudulently, and with intent to diminish the sum to be divided among his creditors, purchased and paid for a place called *Hastings House*, the conveyance of which he caused to be drawn in the name of the Rev. C. C. Gill, the surviving trustee under the settlement executed previously to his marriage with his wife; seventh, that the Insolvent fraudulently, and with intent to diminish the sum to be divided among his creditors, caused the Rev. J. Brathwaite, on the 9th of September, 1853, to confess judgment to C. C. Gill, as such Trustee, in the sum of £8,000 sterling, with interest, upon the trusts of the settlement, the sum of £8,000 being due from *Brathwaite* to the Insolvent; and eighth, that the Insolvent contracted a debt with the estate

(1) NOTE—Since this decision was given the case of *Ex parte Gibson Re Patrick* has been decided (on the 18th of March) by the Lord Chancellor. It is sufficiently similar in its circumstances to the case of the Insolvent to induce me to call attention to it, though subsequent to the decision I felt it my duty to give. See Bar. Rep. 101.

of the Rev. *J. Brathwaite*, under whose will he was a trustee, fraudulently and by means of a breach of trust, and the Chief Justice concluded his judgment as follows:—"I wish I could see one redeeming feature in any one of the transactions brought to light, but taking them altogether I should be wanting in my duty, however painful, if I hesitated to say that the Insolvent had brought himself within more than one of the penal clauses of the Act, and that it is my duty to sentence him to such a measure of its penalties as I think his conduct deserves. It has been stated that the Insolvent has already suffered about six months' imprisonment for debt in *England*; I will give him the benefit of that period of incarceration, and instead of two years, I direct him to be imprisoned in the common gaol for eighteen months."

The Appellant having given notice of appeal to the Judicial Committee of the Privy Council, the Chief Justice directed that he should be detained in custody until he should have given a sufficient Bond to prosecute his appeal, to pay the costs thereon, and to appear and surrender himself in execution of the judgment of the Court. The Appellant and another having executed a Bond, appealed to Her Majesty in Council from the above judgment.

The Appellant subsequently presented a petition to the Queen in Council, to be allowed at the hearing of the appeal to refer to the proceedings in Bankruptcy in the Court in *London*, but such application being opposed, their Lordships directed that the petition should stand over until the hearing of the appeal, when they could refer, if necessary, to the proceedings in Bankruptcy,

The appeal now came on for hearing.

Mr. *H. W. Lord*, for the Appellant:—

First: I contend that the petition upon which the proceedings in Insolvency in the Court at *Barbados* were founded did not comply with the requirements of the 2nd section of the Island Act, No. 234, of 1846. [The LORD CHIEF BARON:—Can you open that question? No appeal has been made from the Order of the Court made on that petition.] If your Lordships think that as no appeal was presented from that Order we cannot now object to it, that ground of argument of course fails. But, Secondly; the Appellant contends that the jurisdiction of the Court of Common Pleas in *Barbados* over him was taken away by the proceedings against him in the Court of Bankruptcy in *England*, and the certificate granted by that Court was a bar to any further proceedings in the Court at *Barbados*. [The LORD CHIEF BARON:—Then you contend, as a proposition of law, that the certificate of the Bankruptcy Court in *England* puts an end to the jurisdiction of the Colonial Court in the Insolvency?] Yes; that is my argument. The certificate of conformity having been granted in *England* under the Act of the Imperial Legislature, 12 & 13 Vict. c. 106, s. 200, protected the person of the Appellant from proceedings under the penal clause, sect. 20 of the *Barbados Insolvent Act*, No. 234, of 1846, in res-

* Present:—THE LORD JUSTICE KNIGHT BRUCE, THE LORD JUSTICE TURNER, and SIR EDWARD VAUGHN WILLIAMS.

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pect to debts which accrued previous to the date of the adjudication in *England*: *Edwards v. Roland* (1). There it was held, that a certificate of conformity obtained under a commission of Bankruptcy in *England*, was a bar to an action for debt contracted in *Calcutta* previously to the Bankruptcy, although the Creditor had no notice of the commission and was resident in *Calcutta*. Here the debts having been extinguished by the English certificate, the criminal charge can no longer be sustained. The debts were provable under the English Bankruptcy. The Respondents having obtained judgment upon the Bills of Exchange before the proceedings in Bankruptcy in *England*, and having elected not to prove the judgment debt under those proceedings; and having interfered by opposing the discharge of the Appellant from custody and by proving their other judgment debt; ought not to have been allowed to have been heard to oppose the final discharge of the Appellant under the Insolvent proceedings in *Barbados*. The Appellant was proceeded against in the Court of Bankruptcy for the same offences for which he has been sentenced to imprisonment by the Court in *Barbados*, but taking into consideration that the only opposing Creditors in *Barbados* were the Respondents, who also were parties to the proceedings in *England*, he ought not to have been so sentenced. Lastly: it is submitted that the allegations held by the Court below as having been proved against the Appellant, were not established by the evidence adduced in support of them, but assuming that all or any of these allegations were proved, the Order inflicts a punishment upon the Appellant which is unduly severe, and disproportioned to the offence.

Mr. *Forsyth*, Q.C., and Mr. *Pontifex*, for the Respondents, were not called upon.

Their Lordships' judgment was delivered by

THE LORD CHIEF BARON:—

Their Lordships do not think it necessary to trouble the Respondents' Counsel in this case.

It appears that the Appellant has been convicted before the Court of Insolvent Debtors, or rather the Court of Common Pleas, possessing jurisdiction as an Insolvent Debtor's Court in the Island of *Barbados*, upon what, for the purposes of this case, we may refer to as four distinct charges of fraud or misconduct within the Act of Parliament passed in respect of Insolvent Debtors in the Island, and has been sentenced to eighteen months' imprisonment. Against this judgment he now appeals to Her Majesty in Council, and the question is, whether either on the technical grounds of law—for they are purely technical—which have been urged in his favour, and urged with considerable ability, by the learned Counsel who has appeared before us, or upon the substantial merits of the case, he is entitled to maintain this appeal?

It appears that the case, which is of a somewhat extraordinary character, is as follows: The Appellant, being a trader,

(1) 1 Knapp's P.C. Cases, 259.

and having been engaged in extensive mercantile transactions in this Island as long back as the year 1857, quitted *Barbados*, after having disposed of his property in a way hereafter to be referred to, leaving his Books and his accounts in a state of the greatest confusion, and also leaving a number of debts unpaid, and consequently a great number of unsatisfied creditors. He appears to have proceeded to *England*, and there certain proceedings took place to which hereafter reference will be made. The Appellant having quitted the Island, his creditors proceeded to take steps under what may be called the *Insolvent Debtors Act* in force there, and on the 29th of April, 1857, upon what is called a petition in Insolvency, he was adjudicated an Insolvent, and was placed within the jurisdiction of the Court in *Barbados*. Every effort was made to realize the property. Proceedings took place from time to time, as well as the Insolvent Court and its Officers were able to resort to proceedings, in order to inquire into the state of his affairs and to realize his effects. Something resulted from this, for it seems that some dividend has been declared, but he was found to be, substantially speaking, without Books of account. It was impossible from the Books that were found to ascertain the true state of his affairs, and nothing could be learnt concerning them but from a number of scraps of paper and memoranda and accounts of a very uncertain and irregular character which were found in his house or in his office. The result was, that though something was realized, nothing satisfactory could be done under these proceedings in Insolvency. In the meantime, it seems he had come to *England* as early as the year 1856, and that in the year 1857, having contracted a debt, he was sued and taken in execution and thrown into prison. He remained in prison for about six months. During that imprisonment, and in order to obtain his liberation, he seems to have resorted, and with success, to some course of proceeding under the Bankruptcy Laws of this Country. Their Lordships have no very distinct evidence, except from his own statement, as to what the real nature and real merits of the proceeding in question were; but certainly he himself admits that the adjudication proceeded upon a fictitious debt, alleged to have existed between himself and a person of the name of *Parker*. It does appear, however, that a person bearing another name, claiming a debt of £53, was the petitioning creditor, and the result at last was, that he obtained his discharge, on the 28th of October in the same year, 1857; and some five years afterwards, under circumstances which are not fully before us, he succeeded in obtaining a certificate, which no doubt discharged him from his debts. Afterwards, having returned to *Barbados*, and being found in that Island, his creditors very naturally resorted to such proceedings as they were enabled to resort to, according to the law of Insolvent debtors in that Colony, and in January, 1865, a motion was made to restore his name to the list of Insolvents, and a day was then fixed for his final examination. The notice was given to himself, and the creditors proceeded to make the charge which has led to this conviction, and to the sentence against which he now appeals. The whole matter came on to be

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heard, and was heard during several days. Witnesses were examined, and he himself was examined, at considerable length, as well as witnesses on his behalf, and the whole matter of these various charges appears to have been fully, and their Lordships are of opinion fairly, and according to law, investigated and considered by the Court in *Barbados*. He was found guilty, and conviction was pronounced upon four of those charges to which we are now about to advert, and he was sentenced accordingly to eighteen months' imprisonment on account of the fraud and misconduct of which he was thus found guilty. The sentence would have been the most severe that the law allows—that is to say, two years' imprisonment—but as he had suffered an imprisonment of six months in *England*, the Court was pleased to reduce the term to eighteen months' and accordingly to eighteen months' imprisonment in the jail at *Barbados* the Appellant has been sentenced.

He now appeals against that judgment and sentence, and substantially it is upon two grounds. It was, indeed, rather suggested than seriously argued, that from the beginning the Court of *Barbados* had no jurisdiction, though certainly the petition of Insolvency appears to be rather informal in its terms and in its character; but upon that petition, which does substantially, though not formally or very explicitly, disclose enough to give the Court jurisdiction, the Court pronounced an order or decree of Insolvency, and from that time to this their jurisdiction and the decree itself have never been questioned, and this appeal is not, in terms at least, directed against that decree. Their Lordships, therefore, pass by that part of the case altogether.

But then it is contended that the proceedings in Bankruptcy in this country, under an Act of the Imperial Legislature, the adjudication in Bankruptcy, and finally the certificate granted by the Commissioner in Bankruptcy in the year 1862, have the effect not only of discharging the Insolvent from the debts which he had contracted in *Barbados*—indeed, any debts to which he might be liable, contracted in any part of the world—but of superseding the authority of the Court in *Barbados* altogether, and depriving them of the jurisdiction which they had acquired under the adjudication in Insolvency in 1857, and of disabling them to proceed further in that matter, and, therefore, of course, to hear the complaint, and to pronounce the judgment and sentence against which this appeal has been brought. Now it is quite true that an adjudication in Bankruptcy, followed by a certificate of discharge in this country under the Bankrupt laws passed by the Imperial Legislature, has the effect of barring any debt which the Bankrupt may have contracted in any part of the world, and it would have the effect of putting an end to any claims in the Island of *Barbados*, or elsewhere, to which the Appellant might have been liable at the date of the adjudication. There is, indeed, much to throw a deep shade of suspicion over these proceedings, but there they are, recorded according to law in this country; there is the adjudication, and there is the certificate. The adjudication has

never been suspended or annulled, the certificate remains in full force; and their Lordships do not, whatever may be their opinion of the circumstances under which the adjudication was originally obtained, feel themselves at liberty to treat the proceeding as otherwise than valid, and of full force as far as it can have any legal effect upon the debts or the proceedings in *Barbados*.

But then the question arises whether the effect of these proceedings in Bankruptcy in this country can supersede the authority of the Court in *Barbados*, and deprive that Court of jurisdiction to inquire afterwards into frauds and offences committed against the law of Insolvent Debtors in that Island, when the Insolvent has returned and placed himself again within its jurisdiction; and their Lordships are of opinion that the proceedings in Bankruptcy in this country have no such effect. The Court of Common Pleas, possessing jurisdiction in the matter of Insolvent Debtors in the Island of *Barbados*, having acquired jurisdiction over the whole matter in the year 1857 by the decree then pronounced, their jurisdiction continues, and continues unimpaired to this day, and in all time to come. It is quite true that the debts may be barred, so that the Court could not proceed to enforce the payment of those debts directly or indirectly as against the debtor, or in any other way; but although the debts may be irrecoverable, the jurisdiction of the Court to inquire into offences committed or alleged to have been committed against the law of Insolvent debtors in that country still continues. It is under that jurisdiction, and in a proceeding perfectly regular in all its forms and in all its stages, that the Insolvent, the now Appellant, has been called before the Court, and these four charges have been preferred against him, upon which four charges he has been convicted and subjected to the sentence in question.

All that now remains for their Lordships to consider is, whether the Court has done wrong, and, therefore, whether this appeal ought to be allowed upon the merits of the case in respect to these four charges, or any of them?

The first of those charges is, that the Insolvent had contracted a debt with the now Respondent without having any reasonable or probable expectation at the time when it was contracted of being able to pay it. Now, the learned Counsel for the Appellant has admitted, and he could not do otherwise, that in fact the charge is substantiated and true, and he only contends that the debt itself being extinguished by the proceedings in Bankruptcy in this country, the criminal charge can no longer be sustained. Their Lordships are of opinion that that is not so, but that the offence having been committed, it was only by an accident that upon this and the other charges he had not been arraigned and prosecuted to conviction in the island. It was owing to his having departed from the Island, and thus wilfully and fraudulently evaded the process of the law, that he was not prosecuted for these offences at a much earlier period; but, as has been already observed, the jurisdiction of the Court still continuing, although the debt is cancelled, he still remains liable to the criminal charge, and upon that charge it is admitted that he has been properly convicted.

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Passing over the fifth charge, which has been withdrawn, their Lordships now come to the sixth, which is in substance that, having purchased with his own money a house or property called *Hastings House*, instead of having the conveyance made to himself, which would have placed it within the reach of his creditors under this very proceeding by virtue of the *Insolvent Debtors Act*, he caused it to be conveyed to the Trustees of his marriage settlement, in effect for the benefit of some members of his family. Without going into what afterwards took place as to the sale, and other machinery with which the transaction became involved, it is perfectly clear that this was in itself a fraud within the express words of the *Insolvent Debtors Act* in *Barbados*, and that therefore he was properly convicted. He seeks to excuse himself in his examination by alleging that he was indebted to the Trustees, and that he had had £900 of their money. If that were so, that would not justify him, unless he had openly and regularly, in satisfaction of that debt, and not by way of fraudulent preference, expressly in consideration of that debt, conveyed the property in question to his Trustees. Then he says he purchased it very cheap, but it appears to have been worth considerably more than the £900 which he alleged he owed to the Trustees. Its value is said to have been £3,000. and this property he withdraws and abstracts from his creditors, and conveys to these Trustees, and then runs away from the Island, leaving his Creditors without the means of obtaining satisfaction of their debts. This charge is, therefore, established.

The seventh charge presents a very simple and clear case of fraud in relation to *Hastings House*, and comes within the express words of the *Insolvent Debtors Act* of this Island. It appears that he prevailed upon the Rev. Mr. *Brathwaite*, a connection of his own, to suffer a judgment for a debt due or alleged to be due by *Brathwaite* to himself, not in his own name—which, of course, in the event of these proceedings having taken place, would have given to his Trustees the full benefit of that judgment, and put the £8,000 in their hands to be divided among the Creditors—but he causes the judgment to be suffered in the name and for the benefit of the Trustees under his marriage settlement, and for the benefit of his own family. He himself scarcely denies the fact. He seeks to say there were some transactions under which this might be justified; but, in truth, it is a very confused story which he tells, and the plain English of the whole appears to be this, that there being a debt due—for one cannot suppose that any gentleman in his senses would have suffered a judgment to be entered up against him for this large sum of £8,000 unless he really owed the money in some way or other—this debt, represented by this judgment, is thus transferred into the hands of the Trustees under the marriage settlement, the judgment being suffered to them and in their names, the Trustee himself, who gave evidence in the case, knowing nothing about the transaction until he is informed that he has become possessed of this security for £8,000, on behalf of the family of the Insolvent. It is clear also that this charge is completely established.

Then, as to the eighth charge, that he contracted a debt to the estate of the same gentleman, the Rev. *John Brathwaite*, deceased, under whose Will he was a Trustee, fraudulently and by means of a breach of trust,—that charge again, upon his own shewing, is substantiated. It appears that after the death of Mr. *Brathwaite*, the Insolvent and another person then in the Island of *Barbados* were co-trustees, and the Trustee in the Island remitted to the Appellant, who was then in *England*, the sum of £500, in order to pay a debt claimed by the Government on account of revenue, in respect of the estate of the deceased Mr. *Brathwaite*. He received the £500; he does not deny that. He goes on to say, “It may have been to pay this debt; it certainly was for the estate of Mr. *Brathwaite*, and I applied it to my own use.” He pretends to justify that by saying he considered he was at liberty to do so, because he had lived with Mr. *Brathwaite* or Mr. *Brathwaite* had lived with him. It is perfectly manifest that this sum of £500 was remitted by him to be applied in discharge of a debt due to the Crown by the estate of Mr. *Brathwaite*, and that instead of doing his duty like an honest man and paying that debt, and so freeing the estate from the claim, he applied it to his own use.

All four of these charges, therefore, being completely substantiated, and there being no answer and no excuse that we can find in any part of these proceedings—even upon the statement of the Appellant himself,—it only remains for their Lordships humbly to advise Her Majesty to affirm the sentence of the Court of Common Pleas of *Barbados*, and to dismiss this appeal with costs.

Solicitors for the Appellant: *Lawrance, Plews, & Boyer*.

Solicitor for the Respondents: *Charles Champion*.

THE SUN FIRE OFFICE v. HART.

(*L. R. 14 Appeal Cases*, 98.)

On Appeal from the Court of Appeal for the Windward Islands.

Fire Insurance—Option of Insurers to terminate Policy on giving Notice—Construction of Condition—Practice—Costs.

A policy of insurance against fire was issued subject to the conditions, first, that it should not apply to any portion of the subject of insurance which should, by reason of some act done after its date without the consent of the insurers, be exposed to increased risk of fire, or removed to a building or place other than that described in the policy; second, that the insurers might terminate it by notice if

“by reason of such change, or from any other cause whatever,” they should desire to do so, refunding to the insured a rateable proportion of the premium for the unexpired time of the policy:—

Held, that the insurers had, by force of this condition, the option of terminating the policy at will.

Costs of successful appeal not ordered, being below the appealable value, and special leave having been given on the ground that its

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decision was of general importance to insurance offices like that of the appellant.

APPEAL from a judgment of the Court of Appeal (June 17, 1887) affirming a decision of the Court of Common Pleas for Barbados (March 28, 1837), discharging a rule nisi to set aside the verdict found for the respondents, and for a new trial on the ground of misdirection in an action upon a policy of fire insurance.

The facts are stated in the judgment of their Lordships.

Cohen, Q.C., and *Wood Hill*, for the appellant, contended that there was misdirection as to the meaning of clause 3 of the conditions, subject to which the policy sued upon had been granted. According to its true construction the policy was determinable at the will of the insurers. The words "from any other cause whatever," should be construed to include any cause which might influence the mind of a reasonable insurer. If the insurers' reasons were the proper subject of investigation by a Court of Justice, it would be for the jury and not the judge to determine whether the facts proved constituted such cause.

Reference was made to *International Life Insurance and Trust Company v. Franklin Fire Insurance and Trust Company* (1). As to the expression "from any other cause whatever," see *Dixon v. Doubleday* (2) and *The Queen v. Payne* (3).

The respondents did not appear.

The judgment of their Lordships was delivered by—

LORD WATSON :—

The facts of this case are not in dispute, and may be shortly stated. On the 12th of May, 1885, Alice Creagh Hart, and five others interested, effected a policy of insurance with the Sun Fire Office, to run from its date until the 30th of July, 1886, on forty acres of sugar canes, uncut, situate on Fairfield Plantation, parish of St. Philip, Barbados. The policy was issued subject to the general conditions indorsed thereon, one of which was in these terms :—

"3. If after the risk has been undertaken by the society anything whereby the risk is increased be done to property thereby insured, or to, upon, or in any building thereby insured, or building or place in which property thereby insured is contained, or if any property thereby insured be removed from the building or place in which it is therein described as being contained, without in each and every of such cases the assent or sanction of the society, signified by endorsement thereon, the insurance as to the property affected thereby ceases to attach.

"If by reason of such change, or from any other cause whatever, the society or its agents should desire to terminate the insurance effected by the said policy, it shall be lawful for the society or its agents so to do, by notice to the insured, or to the authorized representatives of the insured, and to require the

(1) 66 N.Y. Court of Appeals, 1876, 21 Sickles, 119.

(2) 30 L.J. (M.C.) p. 99.

(3) Law Rep. 1 C. C. R. 27.

policy to be given up, for the purpose of being cancelled; provided that in any such case the society shall refund to the insured a rateable proportion, for the unexpired time thereof, of the premium received for the insurance."

There were three fires on the Fairfield Plantation in June, three in July, one in August, and another on the 25th of September, 1885, by which nearly twenty-three acres of canes were burnt. In August an anonymous letter was received by one of the insured, threatening continued incendiarism, and that letter was exhibited to the society's agent. On the 8th of October, 1885, the agent gave written notice in due form to the insured that, in consequence of these occurrences, the society terminated the policy from that date, in accordance with clause 3 of the general conditions; and he at the same time tendered repayment of £5, 6s. 11d., being the rateable proportion of the premium received for the unexpired term of the insurance. The insured refused to accept the sum tendered, or to give up the policy. The losses sustained through fires occurring before the 8th of October were adjusted and paid by the society. Two fires occurred after that date, the one upon the 20th of December, 1885, and the other upon the 30th of January, 1886.

The suit in which this appeal is taken was brought by the insured for recovery of the damage occasioned by the fires last mentioned. In defence, the society relied solely on the effect of its notice of the 8th of October, 1885, as determining the policy, before either of the losses sued for was incurred. The action was tried in the Court of Common Pleas, at Bridgetown, on the 7th of March, 1887, before his Honour Isaac Richard Reece, Acting Chief Judge, and a special jury. The facts already stated were put in evidence; and the learned judge directed the jury to the effect that, the facts not being disputed, the question to be determined was one of law, and not of fact, and that he decided the law in favour of the Plaintiffs. The learned judge ruled as matter of law:—(1) That the words "any other cause whatever," in the 3rd general condition, mean "any change of the same genus" as the changes previously specified, and that the facts in evidence did not amount to such changes in respect of the subject-matter of the suit; and (2) that, assuming the defendants' construction of the 3rd general condition to be correct, they were precluded from exercising their right to determine the policy, by reason of their having advisedly paid for no less than seven fires, in the full knowledge of the circumstances referred to in their notice of the 8th of October. The jury accordingly returned a verdict for the plaintiffs, and the Court gave the defendants leave to apply for a rule nisi for a new trial.

The defendants obtained a rule to shew cause why the verdict should not be set aside, "and instead thereof a new trial granted between the parties," which was discharged by an order of the same judge who tried the action, dated the 23rd of March, 1887. His decision was thereafter affirmed by the Court of Appeal for the Windward Islands, consisting of three members, the Chief Justices of St. Lucia and Tobago, Grenada, and St.

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Vincent. It appears from the judgment of Trafford, J., Chief Justice of St. Vincent, that the defendants' counsel submitted three alternative constructions of the 3rd condition, (1) that it authorized the society to cancel the policy for any cause whatever; (2) that it authorized them to terminate the policy on any reasonable grounds; and (3) that, even on the ejusdem generis principle of construction, the facts proved shewed a material increase of risk, and justified their notice. On the other hand, the plaintiffs' counsel contended for the law as laid down at the trial.

Upon the first ruling, two members of the Court of Appeal, Gresham, J., Chief Justice of Grenada, and the Chief Justice of St. Vincent, agreed with the presiding Judge. Carrington, J., Chief Justice of St. Lucia and Tobago, differed, being of opinion that the jury ought to have been directed that the words "other cause whatever" would include any event or circumstance of such a character as to induce a desire on the part of a fair-minded and reasonable man to put an end to the policy; and that it was for the jury to say whether the reasons put forward by the defendants for terminating the insurance were, or whether any of them was, of such a character. Upon the second ruling the same learned judge held that the presiding judge was wrong in law. The Chief Justice of St. Vincent considered it unnecessary, in the view which he took of the first point, to deal with that part of the direction. The Chief Justice of Grenada concurred in the ruling, but on a different ground from that assigned by the presiding judge. He was of opinion that a letter of the defendants' agent, dated the 22nd of December, 1885, amounted to a waiver of their notice of the 8th of October. The letter contains nothing beyond a request that the insured will delay proceedings for the enforcement of certain claims which had arisen before the date of the notice until the writer had an interview with an agent of the office who was expected from England; and it is difficult to understand how such a request could possibly imply an intention to depart from a notice which did not affect these claims, especially when the communication expressly bears to be "without prejudice, and without any intention of admitting any liability against the Sun Fire Office under the policy."

The third general condition of the policy consists of two branches which differ in their purpose and effect. The object of the first is not to void or terminate the policy, but to prevent its attaching to such portions of the subjects which it is framed to cover as may, by reason of some act done after its date, without the consent of the insurers, be exposed to increased risk of fire. The object of the second, with which we have to deal in the present case, is to enable the insurers to release themselves from their contract during its currency, leaving it in full vigour down to the time of notice. The words in which the power of determination is expressed, taken by themselves, are very wide and comprehensive. According to their primary and natural meaning, they import that, in order to justify the exercise of the power, nothing is required except the existence of a desire, on the part of the insurers, to get rid of future liability, whether such

desire be prompted by causes which prevent the policy attaching, or by any other cause whatever. That construction of the words, read apart from the preceding context, appears to have been accepted by the majority of the Court of Appeal. The Chief Justice of Grenada said, "It is impossible for words to be more general, and, if construed literally, any, the most absurd, construction could be put upon them." It can hardly be suggested that the literal construction of the words would go farther than giving the insurers the option of determining the policy at will; and the learned Chief Justice was apparently of opinion that it would go that length. So far their Lordships agree with him, but they are unable to concur in his view that such a construction would, in any aspect of it, be absurd. The condition does not involve the avoidance of the policy ab initio, or forfeiture of the premium paid by the insured. There may be many circumstances calculated to beget, in the mind of a fair and reasonable insurer, a strong desire to terminate the policy, which it would be inconvenient to state and difficult to prove; and it must not be forgotten that the whole business of fire insurance offices consists in the issue of policies, and that they have no inducement, and are not likely, to curtail their business, without sufficient cause. On the other hand, the insured gets all the protection which he pays for, and, when the policy is determined, can protect his own interests by effecting another insurance.

In two of the learned judgments delivered in the Appeal Court numerous authorities are referred to, which their Lordships forbear to notice, because they have really little or no bearing on the interpretation of the clause upon which the decision of this case must turn. It is a well known canon of construction, that where a particular enumeration is followed by such words as "or other," the latter expression ought, if not enlarged by the context, to be limited to matters ejusdem generis with those specially enumerated. The canon is attended with no difficulty, except in its application. Whether it applies at all, and if so, what effect should be given to it, must in every case depend upon the precise terms, subject-matter, and context of the clause under construction. In the present case there appears to their Lordships to be no room for its application. The theory upon which the ruling of the presiding judge and its affirmance by the majority of the Court of Appeal, proceeds, appears to be this, that the words "by reason of such change" are equivalent to an enumeration of certain particular changes or causes specified in the preceding condition; and that the following words "or from any cause whatever," must be confined to causes ejusdem generis with these. The antecedent context does not contain a mere specification of particulars, but the description of a complete genus, if not of two genera. The first of these is any and every act done to the insured property whereby the risk of fire is increased. Taking that as a particular, none of the learned judges has suggested what circumstances would constitute alia similia.

Their Lordships are accordingly of opinion that the condition must be read in the literal and natural sense of the language which the contracting parties have chosen to employ, and that it

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includes any and every cause which could reasonably induce an insurer to desire the termination of the policy.

The question remains whether the clause gives the insurers the right to act upon their own judgment, or whether they are bound, if so required, to allege and prove to the satisfaction of a judge or jury, not only that a desire exists on their part, but that they have reasonable grounds for entertaining it. If the determination of the policy would be for the advantage of its business, that would obviously be a reasonable ground for the office desiring to put an end to it; and *a priori*, one would suppose that the insurers themselves must be the best if not the only capable judges of what will benefit their business. An insurance office may deem it prudent, and resolve to limit its outstanding engagements, and, unless the words of the clause clearly imply the contrary, it cannot be presumed that the parties meant to make such a question of prudent administration the subject of inquiry in a court of law. These and other considerations already adverted to, have led their Lordships to the conclusion that the sufficiency of the reasons moving them to desire the termination of the risk which they had undertaken is a matter of which the insurers are constituted the sole judges. That conclusion is not only supported by these considerations, but it appears to their Lordships to be in accordance with the natural construction of the language of the clause.

In regard to the second ruling of the presiding judge, and the opinion expressed by the Chief Justice of Grenada, with respect to waiver of the notice of the 8th of October, 1835, their Lordships do not think it necessary to say more than this, that they appear to be founded upon some misconception of the law.

The necessary legal result of their Lordships' opinion is that judgment ought to have been entered for the defendants, who are appellants here, at the trial of the cause. But the appellants, in the Court below, only moved for a new trial, and the judgment appealed from was given with reference to that motion. The case must therefore go back to the Court of Common Pleas for Barbados, in order that the proper order may be pronounced. Accordingly, their Lordships will humbly advise Her Majesty to reverse the judgment appealed from, to make the rule *nisi* obtained by the appellants absolute, and to order the plaintiffs respondents to pay to the defendants appellants the costs incurred by them in the Court of Common Pleas and in the Court of Appeal. Seeing that this appeal was brought by special leave, being below appealable value, on the ground that its decision was of general importance to insurance offices, their Lordships think that there ought to be no order as to costs here.

Solicitors for appellants : *Dawes & Sons.*

TRENT-STOUGHTON v. BARBADOS WATER SUPPLY COMPANY.

[L. R. (1893) A. C. 502.]

On Appeal from the Court of Common Pleas of the Island of Barbados.

Law of Barbados—Water Supply Act, 1886, ss. 11,23—Compensation—Past and Future Profits.

Where certain streams of water had been abstracted from the Appellant's property by a water Company acting under the Water Supply Act, 1886:—

Held, that the compensation due to the appellant included the value of his proprietary interest therein, and was not limited to the amount of pecuniary benefits obtained by past user thereof in disregard of possible benefits in the future.

J. C.*

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June 30.

APPEAL from an order of the above Court (May 22 1891), refusing to set aside a verdict which had been obtained by the appellant. The appellant had originally claimed £1000 as compensation for his interest in the waters (the subject of suit) and damages sustained by reason of their having been abstracted. A special jury awarded £1000. This verdict was set aside as excessive and a new trial had, when a verdict was given for £500. This verdict the Court refused to set aside, the grounds of application to that effect being erroneous rejection of evidence and misdirection in law. Those grounds appear in the judgment of their Lordships.

Cohen, Q.C., and *Swinfen Eady*, for the appellant contended that he was entitled to be compensated for all loss and damage incurred by him in consequence of the respondent having abstracted the waters in which he was interested. The amount of damage was not limited merely to the loss of such user as he had actually availed himself of and enjoyed but extended to the whole value of the property of which he had been deprived. [They were stopped by their Lordships.]

Finlay, Q.C. and *Waggett*, for the respondent, contended that having regard to be the terms of The Water Supply Act, 1886, ss. 10,11 and 23 being specially referred to, and the terms of the notice given thereunder, the appellant was not entitled to compensation under the Act, at all events in this proceeding, for loss of his proprietary interest. Evidence regarding the value of such proprietary right was properly rejected. The loss actually sustained of benefits previously enjoyed was the measure of such damages as the appellant was entitled to in the proceeding instituted by him.

Counsel for the appellant were not heard in reply.

LORD HALSBURY :

THIS is an Appeal from a judgment of the Court of Common

* *Present*:—THE LORD CHANCELLOR, LORD WATSON, LORD HALSBURY, LORD HOBHOUSE, LORD MACNAGHTEN, LORD MORRIS, LORD SHAND, and SIR RICHARD COUCE.

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Pleas of the Island of Barbados, of the 22nd May 1891, by which the Court refused to set aside at the instance of the appellant, a verdict for a sum of 500*l.* awarded to him by a jury as compensation for the abstraction from his property by the respondents of certain streams of water under the provisions of "The Water Supply Act, 1886," and declined to grant him a new trial.

The short point that arises is, whether the direction given by the Chief Justice upon the question of compensation was right; and whether, also, he was right in rejecting certain evidence as to the value of the subject matter in dispute.

Two sections of the Act in question contemplate the acquisition by the Water Company of property necessary for the execution of their works—the 11th section, which gives power to take without agreement, and the 22rd section, which gives power to purchase by agreement, with the owners of any lands or streams or any estate or interest therein, for a consideration in money, any such lands or streams, and all estates and interests in such lands or streams of what kind soever.

Their Lordships are not able to follow the distinction which was sought to be established between these sections. In both of them it is assumed that compensation is to be given to the person whose property is affected by the exercise of the powers of the Act. If the property is taken it is to be paid for, and whether it is by the process of agreement or compulsorily taken under the powers of the Act is immaterial, except that in one case the parties agree, and in the other the sum is fixed by the tribunal pointed out by the statute.

The Chief Justice directed the jury that the question was, not what was the value of the interest of the appellant in the streams, but whether he had sustained damage or loss by being deprived of their use, and that "the question was not as to the money value of the Plaintiff's interest in the streams, . . . but "was whether the plaintiff had been using these streams in some way to his advantage, so that his being deprived of their use, "from their being taken and abstracted by the Defendant Company, worked damage and loss to him." Their Lordships are of opinion that the question was, what was the value of the interest of the appellant in the streams, it being conceded that in the exercise by the respondents of the powers conferred upon them by the Act, those streams had been abstracted, and that the appellant had been deprived of the power of exercising the rights which he had up to that time possessed in respect of them. That is "damage or loss" within the meaning of the Act. Though he never had up to that time obtained one farthing for the use of the streams, and might never have made any use of them, nevertheless, the damage or loss which he sustained was, that he was deprived of the power of using the property which was his.

The second question is in truth involved in the first. The Chief Justice rejected evidence of an offer by The Bridgetown Water Works Company to purchase the appellant's rights in

the streams for a certain sum of money, his view apparently being that unless the appellant had actually made some pecuniary benefit already out of the streams, the possibility of his making use of them in the future was irrelevant to the enquiry as to what was the value of his interest in them. Their Lordships are wholly unable to take that view.

Inasmuch as this matter has been twice before the Courts, and on the first occasion 1000*l.* was given to the appellant, and on the second occasion 500*l.* was given under a direction which their Lordships hold to be erroneous, it may be worth the consideration of the parties whether, to avoid further litigation they should content themselves with the sum which was given on the first occasion, so as to prevent the necessity of a third trial. Their Lordships have no power to direct this course. They can only throw out the suggestion.

In the result, therefore, their Lordships will humbly report to Her Majesty that the judgment appealed from ought to be reversed, that the rule for a new trial ought to be made absolute, and that the respondents must pay to the appellant his costs below from the date of the order of the 6th January 1891, including the costs of the second trial, and his costs of this appeal.

Solicitors for appellant : *Druces & Atlee*,

Solicitors for respondent : *Reyroux Phillips & Golding*.

J. C.

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SUPPLY
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— —

CASES REPORTED IN THE COURTS OF BARBADOS.

THE COLONIAL BANK *v.* CRUMPTON.

(In the Common Pleas.)

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v.

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7th March 1864.

The *Attorney-General* and Mr. *Reeves* appeared for the Plaintiffs. The *Solicitor-General* for the Defendant.

This important case, involving some £6000, has for some time past been the subject of great interest in the community, and to-day being fixed for the hearing, the Court was, from an early hour, crowded in every part, and a large number of spectators, finding no sittings, stood up the entire day. The cause having been called—

A Special Jury was empanelled, consisting of the following gentlemen:—

R. H. Alleyne, B. Inniss, S. N. Collymore, J. R. Greenidge, R. T. Bascom, H. Honychurch, R. D. Shepherd, E. T. Kellman, J. W. Parris, G. P. Hunte, Jno. T. Greaves, B. Leach, Esqrs.

Mr. *Reeves* rose, and briefly opened the pleadings. The learned gentleman said, this was an action brought by the plaintiffs, the Colonial Bank, to recover the sum of £5,995. 18s. 6d. from the defendant, Mr. *Crumpton*, as endorser of seven Bills of Exchange, drawn by Messrs. *John Jeffray* and Co., Merchants of this Island, on Messrs *Swindell Bankhead* and Co., of London, and endorsed by them to defendant, who endorsed said Bills to the plaintiffs, and which Messrs. *Bankhead & Co.*, on presentment refused to accept. The Declaration contained two counts on each Bill; the first averring that the Bill was duly presented for acceptance and was dishonoured, and was duly protested for non-acceptance, of which the defendant had due notice; and the second count that, at the time the Bill was presented for acceptance and dishonoured, the defendant waived and dispensed with notice of presentment and dishonour. To this Declaration, the defendant had put upon the Record several Pleas. The first, that he did not endorse. Second, that the Bill was not duly presented for acceptance. The third, that the Bill was not duly protested. The fourth, that he had not had notice of the dishonour. The fifth, that he did not waive and dispense with notice of presentment and dishonour. The sixth, that he never was indebted. On these pleas the Plaintiffs had joined issue.

and it would be for the jury to say, after hearing the evidence, and the law bearing upon the case, whether the averments in the Declaration were made out, or whether the defendant had made out his pleas.

The *Attorney-General* followed, opening the case. He had the honor, in conjunction with his learned friend Mr. *Reeves*, to appear for the plaintiffs, and his learned friend had very correctly stated the nature of the pleadings, and the issue which the Jury were called upon to decide. The case, he said, was one of the greatest importance to the mercantile community, and he was sure it would receive at the hands of the Jury that attention which its importance demanded. The facts of the case were briefly these—Messrs. *Jeffray & Co.*, during the month of *May* 1861, drew several Bills of Exchange, amounting to £5,990, on Messrs *Bankhead & Co.*, of London, which they endorsed to Mr. *Crumpton*, the defendant, and he endorsed them to the Colonial Bank. They were remitted to London by the Mail which left on the 26th *May*, and reached London on the 13th *June*. The Bills were presented to the drawees on the same day, and on being called for on the following day, they were received back, Messrs. *Swindell* having refused to accept them. The packet acknowledging advices from this Island to 26th *May*, arrived here early in *July*. On the 5th Mr. *Carpenter*, Manager of the Colonial Bank, received a letter from Mr. *Crumpton*, acquainting him that he had just learnt that the Bills of Messrs. *Jeffray*, which he (defendant) had endorsed to the Bank had been dishonoured. The letter was conceived in these terms—“To *Edward Carpenter Esq.*, Manager of the Colonial Bank. Sir,—I have just learnt that the Bills on Messrs. *Swindell & Co.*, have not been accepted. I will call upon you to-morrow at 10 o'clock relative to the matter. Yours respectfully T. CRUMPTON. 5-7-'61. The defendant accordingly called upon Mr. *Carpenter* the next day, and repeating the terms of his letter, said he knew he was liable for the amount of the Bills, and asked for time to satisfy the claim, he (Mr. *Crumpton*) being ready he said to give security for the amount. Mr. *Carpenter* asked him to see him again on the 9th, which Mr. *Crumpton* agreed to, but left with Mr. *Carpenter* a memorandum of the nature of the contract which he was ready to enter into for the payment of the amount of the Bills. The memorandum was as follows:—

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I, the underwritten, T. Crumpton, of the Parish of Saint Michael and Island aforesaid, do hereby, for myself, heirs, executors, and administrators, agree with the Colonial Bank, that I, my heirs, &c., will pay to them, their assignees, &c., the amount of all Bills or Drafts of Messrs. *John Jeffray & Co.*, that have been endorsed to me and passed through the said Bank, which may be returned with interest, &c., by five equal annual instalments, and as security I will give a sealed Note or Bond, and deposit the Title Deeds of certain properties of which I am possessed as herein specified, and in the event of its becoming necessary to sell, I agree to do everything in my power to facilitate the sale,

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but the purchasers are to pay the price by four instalments,—the first on the day of sale, and the other three with interest in one, two, and three years.

Witness my hand and seal this day of
 On the 9th, Mr. *Crumpton* returned to Mr. *Carpenter*, and repeating his liability for the amount of the non-accepted Bills, pressed Mr. *Carpenter* to accept his terms. Mr. *Carpenter* said he could not definitely come to any terms with him then, as he must first know the amount of the Bills which would come back, but promised to write to the Directors who, he had no doubt, would deal favourably with Mr. *Crumpton*, as he was an old customer of the Bank. On the 22nd July, Mr. *Carpenter* wrote formally to Mr. *Crumpton*, acquainting him with the amount of the dishonoured Bills, and subsequently, when he had received from England information that the Bills when they had arrived at maturity had not been paid, Mr. *Carpenter* again wrote to Mr. *Crumpton* on 21st October, giving him notice of the fact, and requiring him to make arrangements to take up the Bills. Mr. *Crumpton* who, on the 6th July, had fully admitted his liability—in reply to Mr. *Carpenter's* letter of the 22nd July said he would pay only if he were shown to be legally liable. Mr. *Crumpton* had not paid and hence the present action. Now, the Jury would have seen that there were two counts in the Declaration. The first, alleging the non-acceptance of the Bills, and that the defendant had due notice of the dishonour; the second, that the defendant had forgiven the consequence of neglect of notice by waiving and dispensing with said notice. There could be no doubt, that the endorser of a Bill of Exchange was in the nature of a surety, and his contract was a conditional one—that he would pay only on the drawee's making default by non-acceptance, or not paying, when the Bill arrived at maturity. And to fix the endorser with liability, it must be shown that the holder of the Bill had given due notice of the default, or that the endorser not having received legal notice, and knowing the facts had waived and dispensed with it. The learned gentleman cited *Byles* on bills on these points. But the Jury must understand that although the burden of proving one or other of these allegations was on the plaintiff, in an action like the present, it was competent for him to prove it, either by direct or indirect evidence. He might show that the notice was given by him or any party to the Bill; or by proving such facts and circumstances, the subsequent conduct of defendant for instance, as would lead a jury to infer and presume that defendant had notice. It had been distinctly held that a Jury might infer notice by his admitting his liability: by his promising to pay: by paying part of the money: and even a letter from a defendant containing no promise to pay, but merely an ambiguous allusion to the Bill being dishonoured, had been held to warrant a Jury in inferring that defendant had notice of dishonour. *Booth vs. Jacobs*, 3 Nev. and Man. 351. Even a conditional promise to pay, although not complied with, had been held to warrant an inference of notice. Just so a jury might infer that a defendant who had not had notice, had by his sub-

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sequent conduct waived it. Now, bearing in mind these facts, it would be for the jury to say whether it was proved Mr. *Crumpton* had notice—judging from direct evidence of notice, or which was equally good, his subsequent conduct; or whether not having had notice, he had done such things as amounted to proof that he had waived and dispensed with notice. He would now proceed to cite from the Books some of the cases decided on the issues raised by the pleadings. *Jackson vs. Collins*, 17 L.J. Q.B. 142, was an Action on a Bill of Exchange. Defendant there pleaded among other pleas that he had no notice of dishonour. The learned Judge before whom the case was tried thought there was no notice of dishonour, and directed a non-suit, with leave to plaintiff to move to enter verdict for him. A rule nisi was granted accordingly, and after argument, it was made absolute, which meant that the verdict was set aside and entered for plaintiff. Lord *Denman* said,—In some cases great strictness has been required in proof of notice of dishonour; but there are cases in which the rule has been relaxed, and I think there is good sense in holding that, under certain circumstances the rule should be relaxed. No doubt the notice should be given in proper time; but here the acceptor, who ought to have provided for the Bill sends the money to the drawer after the time when the Bill was payable. The drawer admits that he had received the money, and merely says he means to keep it. The question is, whether there was evidence. I think the rule must be made absolute. *Patteson*, J., after reviewing the facts proved at the trial, held that the learned Judge was wrong in directing a non-suit, as there was abundant evidence for the Jury. *Cole-ridge*, J., said,—the only question is, whether the defendant received notice of dishonour in due time. I think that a distinct admission of his liability, after the bill was due, will be sufficient to go to the Jury as evidence that he had received notice. On Wednesday the drawer is told by the clerk that the clerk has heard that he has received money to take up the bill. Now, he had either received money, or he had not. If he had, then surely he must be taken to have received notice. If not, then there is the evidence that he did not stand upon his non-liability; but he says he means to keep the money, which is the answer of a man who meant to admit his liability. *Wightman*, J., concurred. *Wilkin vs. Jadis*, 1 *Moodie and Robinson*, was *assumpsit* by the endorsee against the drawer of a Bill of Exchange. The defence was that the Bill had not been properly presented for payment to the acceptor, and also that there had not been due notice of the dishonour. The only evidence of notice of dishonour was, that the defendant, two days after the maturity of the Bill, sent a person to the plaintiffs to say that he had been defrauded of the Bill, and should defend any action brought upon it. Lord *Tenterden*, C. J., said,—It will be a question for the Jury whether the defendant had received notice from the plaintiff, or some party to the Bill. They certainly must be satisfied that notice was given; mere knowledge of the dishonour is not sufficient. But is there not evidence of notice? The communication that any Action will be defended is not put

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on the ground of want of notice, but on fraud : and at that time the defendant knew the holders : how was he likely to know that fact, unless by having received notice ? It is a question of fact for the Jury whether he had so or not, and their verdict will be given accordingly. Verdict for the plaintiffs. In Easter Term, *Campbell*, defendant's Counsel, moved for a new trial on the ground taken at *Nisi Prius*. Rule refused. So also in *Crozon vs. Worthen*, 5 M. and W., which was an action by endorsee against the maker of a Promissory Note for £100 payable to the defendant's order. The Declaration contained usual averments. Defendant pleaded, among other pleas, that the Note was not duly presented. At the trial plaintiff proved the making of the Note by the defendant, but gave no direct evidence of its presentment. He, however, put in two letters of the defendant, in which he asked for indulgence, and stated that he had been drawn into making the Note by the endorser. Plaintiff's Attorney also proved a conversation between himself and the defendant after the note became due, when he engaged to pay the Note by instalments. It was contended for the defendant that this evidence did not support the issue it referred to, but that plaintiff was bound to prove the fact of presentment. The learned Judge reserved the point, and verdict passed for the plaintiff, with leave to the defendant to move to enter non-suit. *Evans* moved accordingly, contending that the subsequent admission did not dispense with direct proof of the issue that the Note was duly presented. Lord Abinger said,—The defendant is the party to pay the Note ; as against him, therefore, it appears to me that the subsequent promise admits all that was necessary to entitle the plaintiff to recover. *Parke* B., concurred. *Alderson*, B.—The defendant is supposed to know the law ; he knows therefore, that he is not liable unless the Note has been duly presented ; with that knowledge he undertakes to pay it. Is not that evidence for the Jury that he knows it has been presented ? The rule was discharged, and the verdict for plaintiff was there fore sustained. In these cases the Jury would see that the Courts had held that notice of dishonour need not be directly proved, but may be inferred by the Jury from the conduct of the defendant, and it was of essential importance that they should understand this in dealing with the present case. But to continue. He would call attention to another case in which the law on the issue raised by the present pleadings was exhausted and it was worth the Jury's best attention. It was the case of *Campbell vs. Webster*, 15 L. J. C. P. 4. This was an action on a Bill of Exchange for a hundred pounds. Defendant pleaded among other pleas, that he had not notice of the protest for non-acceptance. Upon the trial before *Earle* J., it was shown that the Bill had been presented for acceptance and protested by a Notary ; but the protest having been lost, a duplicate had been afterwards made up, and this was tendered in evidence on the trial, but rejected. Certain letters were read, but it was objected that these letters were not sufficient evidence to prove the issues or at all events, that as to protest ; but *Earle* J. told the Jury that if they considered the letters contained a promise

to pay the Bill, they might thence infer that the Defendant was aware that it had been duly protested, and that he had received notice of protest. The Jury therefore found a verdict for the plaintiff. A rule nisi for a new trial on the ground of misdirection was moved for, inasmuch as these letters were not evidence to prove actual protest as alleged, but only waiver of protest, which was not stated in the declaration. *Byles*, Serjeant, showed cause. He said upon this record the facts that the Bill was presented for acceptance, and that acceptance was refused by the drawers are admitted; and the only questions are whether there was evidence, first of protest, and secondly of notice of the protest. A protest may be drawn up at any time; being in fact nothing more than an extended version of the minute made by the Notary at the time of the dishonour, and in practice it is frequently ante-dated, not being regularly drawn up until long after notice of dishonour and protest has been given. But it is unnecessary to contend for this point, as the letters fully justify the direction of the Judge. The fact of presentment of a Bill for payment, or of a protest, or of notice of protest, or of dishonour, may be proved by any admission of liability, even though it does not amount to a promise to pay. The effect of such an admission is a question for the Jury, and the Judge is bound to leave it to them. That a promise to pay is good evidence to be left to the Jury upon an issue as to the presentment, was decided in *Crozon vs. Worthen*. *Alderson*, B., there observes—"The defendant is supposed to know the law: he knows therefore, that he is not liable unless the Note has been duly presented; with that knowledge he undertakes to pay it." Is not that evidence for the Jury, that it has been presented? The rule is the same with respect to protest—*Patterson vs. Beecher*, where the Court held that a subsequent promise by the defendant to pay the amount of a foreign Bill, coupled with a letter written by his Attorney, offering terms for payment, dispensed with other proof of protest. A promise made by the drawer to pay a foreign Bill, was held by Lord *Ellenborough*, in *Gibbon vs. Coggon*, to be sufficient evidence of protest and also of notice. He says—"By the promise to pay, he admits his liability: he admits the existence of everything which is necessary to render him liable." In *Booth vs. Jacobs*, the defendant's letter contained no promise of payment, but merely an ambiguous allusion to the Bills being dishonoured; yet it was held sufficient to warrant the jury in finding that the defendant had received due notice of dishonour. *Tindal*, Chief Justice: "The question is whether the evidence given by the Plaintiff was properly received to support the issues, for if it were properly received, it was for the Jury to consider whether it was sufficient to satisfy them. Now the rule of Law as to this subject is properly laid down in *Patterson vs. Beecher*, by Mr. Justice *Richardson*, in these words:—"It has been decided, in the case *Rogers vs. Stevens*,—That a promise to pay, after a Bill or Note becomes due, will dispense with proof of notice of dishonour. So it will dispense with the proof of protest, as it will amount to an admission on the part of the Defendant that the Plaintiff had a right to resort to him upon the

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Bill." That, continued Chief Justice *Tindal*, goes to the foundation of the matter, and puts the promise to pay on the footing of a dispensation with further evidence of the protest; and it was a question for the Jury to say, from the contents of the letters, whether the formalities as to protest and notice of it had not been complied with. *Coltman J.*, said in effect,—That an express promise is not necessary. Communications, the terms of which have been weaker than these, have been held to contain a sufficient admission in other cases, and I think the verdict must stand. *Maule, J.*, concurred, and *Earle, J.*, also:—"I thought that an admission of liability amounted to an admission of all the facts necessary to raise it." The case of *Gibbon vs. Coggon*, 2 Campbell, said Mr. *Sealy*, had been already referred to in the able exposition of the law to be found in the argument of Mr. Serjeant Byles, which he had just read, but as it was among the cases he had put down to be cited, he would merely observe, in passing, that this had reference to the arrest of a person called Colbourne who was liable on a Foreign Bill of Exchange, endorsed to the plaintiff. In proof that Colbourne had received notice of the dishonour of the Bill, the evidence was, that after it had become due he was told that it was dishonoured, and called upon to pay it, when he said that his affairs were at that moment deranged, but that he would be glad to pay it as soon as his accounts with his agents were cleared. It was contended in behalf of Colbourne, that to charge him as the drawer of a Foreign Bill of Exchange a protest must be produced, as the only regular notice of the Bill being dishonoured. It was then that Lord *Ellenborough* laid down the law thus emphatically: "By Colbourne's promise to pay he admits his liability; he admits the existence of everything necessary to render him liable." Then there was the case of *Margetson vs. Aitken*, which was also an assumpsit by the plaintiff as the endorser against the defendant as endorsee of three Bills of Exchange. There was no proof of any notice of dishonour, but a witness proved that after the Bills had become due the defendant offered to pay the plaintiff a composition of eight shillings in the pound. The effect of this case was, that if after a Bill is dishonoured the endorsee offer to pay the holder so much in the pound on the amount, this dispenses with proof of the notice of dishonour. The Attorney General next cited *Vixon vs. Elliott* 5 C. & P. 437, to show that a Bill being shewn to endorsee two months after it was due, and he having offered to pay ten shillings in the pound, this was held to amount to a waiver of notice of dishonour. In furtherance of the same line of argument, the learned Counsel cited *Rabey vs. Gilbert*, 30 L. J. Ex. 170, where *Bramwell B.*, said, "It is quite certain that if a man who has not had due notice of dishonour, nevertheless thinks fit to acknowledge his liability, that will be enough to maintain an action." The learned gentleman cited several more cases to the same effect; among these *Mills vs. Gibson*, 16 L. J. C. P., 249; *Wood vs. Deane*, 7 L. T. N. S., 501; and, lastly, *Corderi vs. Calvert*, 8, L. T. N. S., 245; which was a case decided April last year, where it was held by the Queen's Bench, that a promise to pay a Bill of Exchange,

made to the endorser by the drawer, cures the want of presentment and notice of dishonour. It would then be for the Jury to say, after hearing such evidence as he should lay before them, whether in view of the ruling on this matter, which he had cited from the authorities the defendant had received notice of the dishonour of these Bills, or whether, by his having admitted his liability upon them, and by his subsequent conduct, he had waived and dispensed with such notice.

Edward Carpenter sworn. Is Manager of Colonial Bank; was so in 1861. Knows defendant, who dealt with the Bank in 1861, and up to a late period very extensively. Does not now deal with the Bank. In 1861 defendant endorsed several Bills to the Bank which were drawn by Messrs. *Jeffray & Co.* on Messrs. *Swindell Bankhead & Co.*, of London. The amounts of the Bills were some £5,995 18s. 6d. Dates of the Bills were—11th May, '61, £725, 15th May £850, 16th May £650, 18th May £350, 21st May £850, 22nd May £875 16s 10d, 23rd May £650. He puts in the Bills and proves defendant's signature as endorser. These Bills were forwarded to England to the Colonial Bank on 26th May. They came back protested. Protest put in. Protest arrived by Packet of 21st or 22nd July. It is a protest for non-acceptance. Date of protest is 22nd June. Bills were subsequently protested for non-payment: protest for non-payment dated 23rd September. The Bills must have been presented in London for acceptance about 13th or 14th June, and next mail left Southampton on 17th June, and reached here on 3rd or 4th July. On 5th July defendant sent a letter to witnesses respecting the Bills. It is as follows:—

Dear Sir,—I have just learnt that those Bills on Messrs. *Swindell & Co.*, have not been accepted. I will call on you to-morrow at 10 o'clock relative to the matter.

Yours respectfully,

(Signed),

T. CRUMPTON.

To *Edward Carpenter*, Esqr., Manager of the Colonial Bank.

The defendant called on the following day and said, he had called respecting the letter of the day before, and asked if he had got his (defendant's) letter. He said he had. The defendant said, the Bills not having been accepted, he knew that he must pay the money. He said he knew his liability, and hoped the Bank authorities would give him indulgence for the amount, it being a large one. He said he was fully able to pay, but that he could not then put his hand upon the sum, his means being locked up in Mortgages, Judgments, Securities, &c. Deponent said that he would do all he could to induce the Directors to be lenient with such a good old customer. The defendant said he could give security for £10,000 if necessary: but what he wished particularly to guard against, was any talk about his credit, and that he could not meet his demands. The defendant said that there was no necessity to draw a Deed, for he was accustomed to do those things and could draw one as good as a Lawyer and so save the expense. (Laughter.) He (Mr. C.) told the defendant that the better way would be to put his views upon paper. He said he would, and promised to call on

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the following Tuesday. He did call on the following Tuesday, 9th July, and much the same conversation passed between them as they had on the prior occasion. The defendant then produced a memorandum as follows:—

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I, the underwritten, *T. Crumpton*, of the Parish of Saint Michael and Island aforesaid, do hereby, for myself, my heirs, executors, and administrators, agree with the Colonial Bank, that I, my heirs, &c., will pay to them, their assignees, &c., the amount of all Bills or Drafts of Messrs. *John Jeffray & Co.* that have been endorsed to me and passed through the said Bank, which may be returned with interest, &c., by five equal annual instalments, and as security I will give a sealed Note or Bond, and deposit the Title Deeds of certain properties of which I am possessed as herein specified, and in the event of its becoming necessary to sell, I agree to do everything in my power to facilitate the sale, but the purchasers are to pay the price by four instalments,—the first on the day of sale and the other three with interest in one, two, and three years.

Witness my hand and seal this day of .

Deponent continued—That paper is in the handwriting of the defendant; it has no signature. He told the defendant that he could come to no definite decision then, for he could not tell what would be the amount of the Bills that would be returned, therefore it would be better to wait till the arrival of the next Packet. On the arrival of the next Packet on 20th July he got advices of the dishonour of the Bills on *Swindell Bankhead & Co.*, and he formally notified the same to the defendant, to which letter he got as formal a reply.

This was put in and read as follows:—

Bridgetown, 23rd July, 1861.

Sir,—I have to acknowledge the receipt of your communication of yesterday's date, apprising me that certain Drafts drawn by Messrs. *John Jeffray & Co.*, on Messrs. *Swindell, Bankhead, & Co.*, of London, endorsed by me, amounting to £6,270 16s. 10d. sterling, had been protested for non-acceptance, and stating that you trusted I would be prepared to pay the same with all costs and damages should they be returned unpaid at maturity. I beg to say that as regards the Drafts of the 3rd of June and 29th May, for £245 and £375 respectively, I shall be prepared to pay them if not paid at maturity, but as regards all the other Drafts specified in your letter, I do not consider myself in any way liable to pay them, not having had due notice from you as holder of their dishonour.

I am, Sir, your obdt. servant,

(Signed)

T. CRUMPTON.

Edward Carpenter, Esq.,
Manager of Colonial Bank.

On the occasion of the defendant's proposing his terms of payment, he (Mr. C.) consented to the terms of his agreement generally; but simply observed that the defeasance was too long. However, in both conversations that he had with the de-

fendant, he (defendant) distinctly and emphatically avowed and admitted his liability. The defendant in the first conversation they had upon the subject of the Bills, told him he had learnt from the Drawers that the Bills had not been accepted.

Cross-examined by the *Solicitor General*—Those bills being presented for acceptance on the 13th or 14th of June he could, in the ordinary course of events, have got advices of them by the steamer that left England on the 17th. He did get letters on business by that packet. He did not get advices of the protest till the packet of 2nd July, but he could have got advices on the matter by that of the 17th June. The manner in which he could account for not getting advices on the 17th was plain. It happened that when the Bills were presented to the drawees by a Bank Clerk, they were returned for non-acceptance, and by an oversight of that Clerk those Bills were put amongst accepted ones, and not discovered till the packet left. The Bills might have been noted for protest on the 15th June, certainly, and if so, he could have had advices of the protest by the Steamer which left England on 17th June, and arrived here about the 5th July. The Bills were actually protested for non-acceptance on 22nd June. He did not get advices of the non-acceptance of the Bills till the arrival of the Packet on the 20th July. The seven Bills in dispute were returned with two others, which two had since been paid by the defendant. The steamer which brought the Bills, he believed, arrived on a Saturday; she was signalled at 2 o'clock, and came in too late on that day to give the defendant notice of Protest, but he sent the notice in the course of the day on Monday. The defendant replied by letter repudiating his liability to pay the money. When the first conversation, 6th July, took place, he (Mr. Carpenter) did not tell the defendant that he had not got information that the Bills had been dishonored. He did not between the 5th and 21st July, tell the defendant that the Bills were all right—that he need not trouble himself about them. Before 21st July, he did tell him, that it was owing to the negligence of a clerk in England that they had not at an early time given notice of the Protest. The Directors had said that they hoped defendant would not take advantage of the delay. He did not write the Directors anything about the defendant's offer to compromise until his refusal to ratify his promise. He did not accept defendant's proposition, for he did not believe that he had authority to do so. At the time of this occurrence the defendant was otherwise liable to the Bank in the amount of \$160,000. He has not paid all he owed for the amount of the seven bills is not paid. The Bank does not lend money upon anybody's mere motion. If the *Solicitor General* required to borrow money of the Bank he would have to give his promissory note, backed by some solvent person.

Re-examined—When defendant called on the 6th July, he did not ask if the Bills had been returned. In a subsequent conversation, he did ask him (defendant) if he had any intimation of the Protest.

This was the case for the plaintiffs.

The *Solicitor General* moved for a non-suit. He contended

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that there was no case for the Jury, for the very first and most important requirement of the Law had not been satisfied. It was clear Law, as his Honour would tell them when he came to sum up, that it is incumbent upon the holder of a Bill of Exchange to give the indorser what is called due notice of the non-acceptance, and it had been over and over held, that in case of an Inland Bill, notice must be sent by that day's post, or, if too late, by the following day's. In case of foreign bills, advices must be sent by the very next public conveyance that leaves. In this case that requirement of the law had not been satisfied, for upon the showing of the plaintiffs themselves the bills had been presented on the 13th or 14th of June, 1861, and the next packet that left did so on the 17th, therefore there was ample time for notice of dishonour to be sent. The law not having been complied with in the most important respect, he held that there was no case for the Jury.

The *Solicitor General* cited in support of his motion *Pitchev v. Graham*, 3 Tyr.

The *Attorney General* and Mr. *Reeves* contended that the whole question turned upon the point whether the subsequent conduct of the defendant was such as would justify the Jury in presuming that he had notice of the non-acceptance of the bills. The question was one of inference, and the cases cited in the course of the trial went to show that the matter was essentially for the Jury. The Jury might draw the inference that the conduct of the defendant showed he had notice, or that he had waived notice, or they might not; but unquestionably the issues raised by the pleadings were for the Jury; and the learned Counsel, after arguing at some length, submitted that the Court was bound to submit the cause to the Jury.

His Honor concurred. He remarked that he would not be justified in assuming such a heavy weight of responsibility as he would have to bear if he took upon himself to non-suit the plaintiffs. The case must go to the Jury.

The *Solicitor General* then rose to open the defence. The learned gentleman did so with unquestionable skill, and at considerable length. We don't pretend to give the entire speech or even a full summary. We pretend to do no more than merely indicate the line of argument adopted by him, as we have already done in the case of the *Attorney General*. He commenced by saying that, although he had been at the Bar for twenty years, and had been engaged in a great many suits, he only confessed the plain and simple truth, when he said that he had never felt so oppressed by the magnitude of the interests confided to his care by a client, as he did on the present occasion. The amount of money involved was considerable, and he could not rid his mind of the serious responsibility he undertook, when he remembered that if, from want of skill on his part, his client should, in the end, lose the case, that would be a result most disastrous—nay, ruinous to his client. His client appeared to fight this battle against a rich and powerful corporation, to whom the loss of £5,000 or £6,000 was nothing; whilst, as he had already said, a verdict

which would render his client responsible, would be almost his ruin—for £6,000 was a fortune. Against this powerful corporation, represented by the great ability of his learned friend the *Attorney General*, his client represented by him (the *Solicitor General*) had to contend; and if they did not shrink from the issue, it was because they were conscious that they would in the end be shown to have alike the law and the facts on their side, and that they were justified on every ground in coming into Court and contesting this action. He was far from admitting that if he were content to rest the case where it was now, that the plaintiffs had made out the averments of their declaration, but if the Jury would suspend their judgment until they had heard the evidence of the defendant, they would find that Mr. *Carpenter* was in error on many points of very essential importance in this enquiry. He (Mr. *Packer*) meant not the slightest imputation upon Mr. *Carpenter*; but when it was remembered that the transactions now being spoken to, occurred so far back as 1861, and Mr. *Carpenter* had since that period, endured a long and painful illness, it would be only the most natural of things if Mr. *Carpenter's* memory was not so good with respect to events unfortunately long passed by, as that of a man like Mr. *Crumpton* who had been well, and who would besides, from the strong personal interest he had in the matter, register every fact in his mind, and retain in his memory every incident in connection with the matter. He knew the consequences of putting Mr. *Crumpton* in the box; it would be to expose himself to the powerful and eloquent reply of his learned friend, but in spite of that risk he would examine Mr. *Crumpton* who would establish beyond question that there were not in this action any of those elements which would fix the defendant with liability on either of the grounds so dexterously taken up by his learned friends on the other side in framing their declaration; and he would, above all, directly contradict Mr. *Carpenter's* evidence, that he (the defendant) had told him that he had heard from Mr. *Jeffray* of the dishonour of Bills. His client was aware of the prejudice naturally excited against a man who appeared to wish to get out of what seemed at any rate a clear moral liability, by means of legal forms and technicalities; but his client had been himself a victim; he had none of the money represented by the Bills endorsed to the Bank. He incurred by the endorsement a strictly legal liability, and he felt that he was justified in standing up for the strictest proof that every condition had been observed to render him liable. They had heard a great deal about the law governing Bills of Exchange, and his learned friend had cited, in a manner most creditable to his research and industry, a great many cases in which all the points incidental to trials of this description, had from time to time, been most elaborately argued and received judicial exposition. The great vice in the argument of his learned friend was that the cases he had cited, although good, were not cases that bore immediately upon the case to-day before the Court. He was sure they could not but have observed from the manner in which his learned friend had

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opened his case and the course he had adopted, that the real question at issue had been most carefully laid aside. He too would have to trouble the Jury with a little law, and he would likewise cite cases, but they would not be so many as his learned friend had favoured them with, and he hoped they would bear more upon the case. The learned gentleman set out by showing as the *Attorney General* had shown before that, upon certain broad grounds of law relating to Bills of Exchange and promissory notes, they must all agree. On these points all the text writers were agreed, and the same conclusion must be arrived at whether we consulted *Byles* or *Story*. The endorser of a Bill of Exchange made a conditional contract with the endorsee or holder of the Bill, that he would pay in the event of the drawer making default. But the law was distinct that to make the endorser liable, he must immediately the drawee makes default receive from the holder, or at any rate some party to the Bill, (for a stranger is not competent to give the notice) due notice; acquainting him (for that was the object of the notice) firstly that the drawee had made default, and secondly, that he was looked to to pay. In the case of an Inland Bill it must be sent the same day the dishonour took place, or, at any rate, the day after, or it would be too late. And in the case of a Foreign Bill, the notice must be sent by the first regular ship that leaves for the port where the endorser lives. More than that, the Bill on being refused acceptance must be at once, the same day, noted for protest, which must come along with the notification of the fact of dishonour; in fact without the protest, there can be no notice, because it is the protest which is the prescribed legal mode of authenticating the non-acceptance, or non-payment as the case may be. Well then, these Bills were proved by Mr. *Carpenter* to have been dispatched to England, by the Mail of 26th May. They reached England on 13th June, and were actually presented for acceptance on 13th or 14th June, and dishonoured on the 15th, at latest. It was admitted that a Mail having left England on 17th June, the Bills could or ought to have been heard of on 5th July. But they were not until 20th July. More than that they had it in actual evidence from plaintiffs' Manager that the Bills, although refused on the 14th June, were actually, as a matter of fact, not noted for protest or protested until 22nd June. It was then, simply impossible that the protest could have come by 17th June Packet and reached Barbados on 5th July; so that defendant could not possibly have had notice on 5th July, when he was legally entitled to it. There was an end, therefore, to the first count of the Declaration: the plaintiffs themselves had put it out of Court, for Mr. *Carpenter* had himself admitted that the Directors wrote to him to say, that they hoped Mr. *Crumpton* would not take advantage of the oversight. The only point remaining: the issue on which the case must actually turn, was—whether the defendant, subsequently to the laches of the plaintiffs, had waived and dispensed with the right to notice, and knowing that he was, by that laches, released from legal liability had nevertheless admitted and confessed himself liable. His learned friends' case was that the conduct

of the defendant was such as would lead the Jury to infer that he had so waived and dispensed with the consequences of want of notice, and on that point had cited several cases. Now the first case he should cite was that of *Pickin v. Graham*, 3 Tyr. 923, which was an action on a Bill of Exchange by endorsee against drawers. The facts as they came out on the trial were, that the Bill was drawn at a month's date by an agent, on behalf of drawers, on a person named Wragg; endorsed twice, and ultimately to plaintiff. While the Bill was running, drawee became embarrassed, and executed a bill of sale to his Broker, of which the second endorsee, a person named Potter, knew. When the Bill became due, Potter saw Wragg, and from what he said of his distressed circumstances, Potter told Jarvis, first endorsee, that the Bill would probably not be paid; and Jarvis that day informed the drawer of what he had heard. Next day the agent of the drawer called on Potter on the subject of the intimation he had received from Jarvis the day before, and after having seen Wragg, the acceptor, said—"If that be so, I suppose there will be no alternative but my taking up the Bill, and if you will bring it up to *Sheffield* next Tuesday, I will pay you the money. On that day Witham (drawer's agent) met Potter and asked him if he had brought the Bill; he answered that he had not got it. In fact he never received notice of dishonour until 9th June, nor did Jarvis immediate previous endorser, or defendants (drawers) receive, notice until 11th, when they respectively refused to pay, on the ground that they had not notice of nonpayment in due time. The fact was, that in the interim, (as the reporter says in a note) plaintiff was absent from home, and the parcel containing the Bill returned unpaid by the London correspondent of his country banker, never reached his hands until Saturday, 9th June. The Bill was due on 29th May. The plaintiff was nonsuited, with leave to move to enter a verdict for him for the amount of the Bill, if the promise by Witham should be held sufficient to dispense with notice of dishonour. A rule was obtained, and it was contended that defendant was at liberty to refuse payment in consequence of plaintiff's laches, notwithstanding the promise made by defendant's agent at the time when they were ignorant of that laches. For plaintiffs it was argued that Witham (defendant's agent) being aware that the Bill would be dishonoured at maturity, might waive the necessity to give notice of dishonour, and promise to pay the Bill. *Vaughan B.*, after reviewing the facts and saying that no notice of dishonour had reached the defendants until 11th June, said it had been contended for plaintiff that he was entitled to recover on the ground that though the defendants had no actual notice they had knowledge of the expected dishonour, and with that knowledge promised to pay. And it was said that though the right of a party liable on a Bill to receive notice of the dishonour in due time is undoubted, yet it may be dispensed with by a party entitled to such notice, and that a Jury may infer from a promise to pay by him that the notice was waived or was regular. Now there is a wide difference between notice and knowledge as applied to

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Bills of Exchange and Promissory Notes. It was laid down in *Tindal v. Brown* (1. T. R. 167) per *Ashurst J.* that notice means something more than knowledge, and a variety of later cases establish that mere knowledge of dishonour is not that notice of dishonour of a Bill which is required in order to fix the prior parties to a Bill. Thus in *Baker v. Berch*, the acceptor went to the drawer (who was the defendant) and telling him that he (the acceptor) could not take up the Bill—gave the drawer £5. 5s. towards his taking it up. Yet the defendant, though he took it and promised to take up the Bill was held discharged of his liability for want of due notice of dishonour.....It is however argued that in this instance there was an absolute unqualified promise to pay. Such a promise made by a drawer or indorser after a Bill has become due and has been dishonoured implies that the notice and presentment were regular, and juries have been properly directed to presume accordingly. But what passed in this case seems to me to amount only to this; that in a conversation about the expected dishonour of the Bill the agent of the drawers, supposing that they had no alternative but to pay, used the expressions relied upon in contemplation of a regular notice of dishonour about to be received. His words import a fear of being compelled to pay if the Bill came back in due course, and that as it would probably do so, there would then be no other course to be adopted but to pay the Bill. That in his opinion did not amount to an absolute promise to pay the amount. A numerous class of cases establishes that a promise by a party liable on a Bill to pay it after its dishonour, admits the existence and *rite actum* of everything necessary to make him liable, viz., the presentment and regular notice. Though it is unnecessary to go through the long bead roll of them on a point of such common occurrence, it may be as well to mention that in *Borradaile v. Lowe*, Sir *James Mansfield* in delivering judgment said—"I do not find any case in which an indorser, after having been discharged by the laches of the holder, has been held liable on his endorsement, except where an express promise to pay the Bill has been proved. Now, the defendant's letter contains no such express promise, but in a great measure shows that the defendant was writing under the supposition that he was liable." He afterwards says—"I cannot consider the letter as conveying an express promise to pay at all events, whether Trevor & Co., did or not, and I think in this case it would be too much to fix the defendant by any such implied promise." In most of the cases, continued Mr. Baron *Vaughan*, in which the defendants have been held liable, they have either made an express promise to pay, or a promise when they had full knowledge that they were discharged. A promise made without knowledge of the laches is not binding and does not estop the party from insisting on a discharge on account of it. *Bolland and Gurney B. B.* both concurred, and the rule was discharged. Now, remarked the learned Counsel, this case, if the Jury had followed him was mere in point than anything his learned friend had cited. His learned friend had cited cases in which parties who knew all the facts which went to release them from liability had

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made a binding promise from ignorance of law. But, as Lord *Mansfield* said in the case which Baron *Vaughan* referred to, there is no case in which a party to a Bill being discharged by the laches of the holder, is made liable except on express promise. In the present case even supposing the promise made by Mr. *Crumpton* on the 5th of July, as alleged, had been an absolute express promise, how could it bind him as amounting to a waiver of notice, when in fact he was blindfolded and did not know what he was waiving. Did he then know that the laches of the holder's clerk had entirely released him? Did he know this or anything about the laches until 22nd July, when far from promising to pay, he denied all liability. The Solicitor-General next cited *Woods v. Dean*—32 L. J. Q. B. 1. It was an Action on a Bill of Exchange; defendant traversed notice of dishonour. This case had been cited by his learned friend, but what were the facts? At the trial before *Mellor J.* the Bill declared on was produced endorsed by defendant. He need not go into the circumstances of the case further than to say that the Bill becoming due on the 9th July, the person to whom the defendant had endorsed it wrote on the 3rd to defendant reminding him that it would become due on 9th July. On the 23rd a party to the Bill had an interview with defendant of which he gave the following account: "I called at the shop and walked with him to the Railway Station. I told the defendant that Messrs. *Woods* the plaintiffs who had discounted the Bill had informed me that they were about to take proceedings against him on the Bill, and that to prevent him being put to expense, I had called upon him to see what he was going to do about it. The defendant said it was a very hard transaction, as he had lost money by his son-in-law, but would pay the Bill if I would give him time to pay it. Defendant was to write in two or three days and say what time he required but did not. Defendant on being examined said he did not receive any notice of the dishonour of the Bill..... He had said he would not pay unless he was compelled. In cross-examination he said that it was very likely that after he had seen *Young*, his attorney told him he was not liable on the Bill. The learned Judge told the Jury that the endorser of a Bill was entitled to notice of dishonour, unless he agreed to waive it, and if he had no notice of dishonour unless he agreed to waive it, he would have a good defence. Whether the defendant had waived that defence at the interview on the 23rd of July, was for the Jury to determine on the evidence."

Chief Justice—Exactly; which shows that there was no ground just now for a non-suit.

Solicitor General—The Court I doubt not was right: moreover, I cited a case in support of my motion. The learned Counsel continued to read. The Jury found for plaintiff, saying that there had been no notice of dishonour but defendant had waived it. A rule for a new trial was moved for, and in the event refused, but there the defendant had not made the promise in ignorance of the fact. On the contrary, the Judges distinctly laid it down the other way. *Blackburn J.* said,—quoting *Story* on Bills, s. 320, "In general, it may be stated that

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a party who is once discharged by want of notice or other laches on the part of the holder is always discharged, and he cannot be made again liable, unless by his own voluntary act. But he may waive his right to take exception, and confirm his original obligations. If he makes such a waiver in ignorance of the fact (and it was here, said the *Solicitor General*, he marked the fatal spot in his learned friend's case) he will not be bound by it." Now, supposing Mr. *Crumpton* had made a positive promise at all, had it been shown that he made it with knowledge of all the facts? "If," continued the passage he was citing, "the party makes the promise with full knowledge of all the facts, but under a mistake of law he will be bound by it."..... Again, "the promise must be unequivocal, and amount to an admission of the right of the holder." Further, said the same passage, "If it be a conditional offer of payment, then and in such a case the holder has not any right to insist upon it as a waiver." What pretence then was there for saying that this case, which had been cited by his learned friend, supported his case? Why Mr. *Carpenter* had proved distinctly, that Mr. *Crumpton's* offer was conditional, and moreover, that he had not accepted it. In this case *Cockburn C. J.*, and *Wightman*, and *Mellor J. J.* were all of opinion that when the defendant waived he had full knowledge of all the facts. His learned friend had also cited *Baby vs. Gilbert*, but really this did not serve his purpose at all, because there the admission was by allowing judgment to go by default, when sued on the bill, which was stronger than a mere conditional promise to pay. Equally inapplicable was *Margetson vs. Aikin*. A case on all fours with this was *Goodall vs. Dolly* 1. T. R. 712, where it was held that if the endorsee of an Inland Bill not due, present it for acceptance, which is refused, and delay giving notice to his endorser, the endorser will be discharged, and a subsequent proposal by endorser to pay the Bill by instalments, made without knowledge of the endorsee's laches is not a waiver of the want of notice. In this case endorsee presented the bill for acceptance to a person named Rutter, the drawee, who refused to accept. This refusal took place on 8th November, but the first intimation defendants got of the non-acceptance was on 6th January, following, the communication only mentioning generally the return of the Bill, without specifying the time or circumstance of the tender of the Bill to Rutter and his refusal. The Bill expired on 11th January and on the next day defendant made a proposal to one of the plaintiffs to pay the bill by instalments. *Heath J.* was of opinion that as this proposal was made under ignorance of all the circumstances of the case, which it was material for the defendant to know, he was discharged by the laches of the plaintiffs, and in consequence of that direction the Jury found for defendant. A motion was made by *Lee* for a new trial on two grounds; First, that as notice in this case could not have been of any service to the defendant, inasmuch as Rutter was insolvent when the bill was refused acceptance, it was not necessary to give notice before the bill became due, and the endorser still continued liable. Secondly, supposing he

might once have taken advantage of the plaintiff's laches, yet he had waived that advantage by his subsequent promise. *Balguy* shewed cause: As to the first point, it is perfectly clear that the plaintiffs, if they meant to resort to the defendant, should have given immediate notice to him of the bill's being dishonoured; instead of which, they suffered a long space of time to elapse, by which neglect they have discharged the defendant. As to the other point; the defendant cannot be said to have made himself liable by his subsequent conduct, for if that were so the same reasoning would have governed the case of *Bleford v. Hirst* where there was an absolute promise to pay. That therefore was much stronger than the present; for here the party did not absolutely say that he would pay the bill; but, under an ignorance of all the circumstances, he proposed to pay it by instalments. This then, at most was only a conditional offer, and not being accepted was the same as if it never had been made. *Ashurst J.*: The case of *Bleford v. Hirst*, goes the whole length of deciding the present. It was then determined that though in was not necessary that the holder should present the bill for acceptance before it became due, yet if he do, he must give immediate notice to the persons from whom he received the bill in case it is dishonoured. Here such notice was not given, and therefore the defendant was discharged. But, then, it is said that he made himself subsequently liable by his proposal to pay the bill by instalments which amounted to an acknowledgment of the debt. That argument might as well have been urged in the case of *Bleford v. Hirst* as the present, if it had been thought material. For there the endorser absolutely promised to pay the Bill on his return from Leeds; but on his being apprised that he was not bound by law, he refused. And yet that was not held as a waiver of the want of notice. That, indeed, was a stronger case than the present; for here the defendant only made a conditional offer to pay by instalments, which, being rejected, put matters in the same situation as if no offer had been made. The defendant, then, had a right to stand on the strict rule of law; and by law he is not bound to pay. *Buller, J.*: It is rather extraordinary that in the case of *Bleford v. Hirst*, it should have been made a doubt whether notice of non-acceptance, in the case of an Inland Bill of Exchange was necessary to be given the drawer. For it had long been settled that notice was necessary to be given in the case of Foreign Bills. But no mention is there made of the want of notice being waived by a subsequent promise; and that was a much stronger case than the present; for there was an express promise to pay by the endorser: but in this case there was only a conditional promise, which was made by the defendant under a total ignorance of the circumstances relative to the Bill being dishonoured. All this is an answer to an action against the endorser. But if the action had been brought against the drawer, I should have been willing to let in the affidavit to shew that the drawer had no effects in the hands of the drawee. That would be like the case of *Bickerdike v. Bolman*. If A draw on B, it must be taken as *prima facie* that he has effects in

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his hands; otherwise he has no right to draw on him; but if the drawer has no effects in the hands of the drawee, he cannot be injured by want of notice that the drawee will not pay. The learned Counsel also cited the following cases: *Burgh v. Legge*, 5 M., and W., 411; *Borradaile v. Lowe*, 4 Taunton, 93; *Hopley v. Dufresne*, 15 East, 275; *Standage v. Creighton* 5. C. and P., 406; and concluded an able speech by maintaining that, the first count of the Declaration having been in effect abandoned, before the second could be upheld, the plaintiffs were bound to satisfy the Jury—first that the defendant had made an unconditional and absolute promise to pay, and that he did so with a full knowledge of all the facts and circumstances which it was material for him to know.

Thos. Crumpton sworn. Deposed that he is the defendant in this action, and in the year 1861 endorsed certain Bills of Exchange to the Colonial Bank, drawn by *J. Jeffray & Co.*, upon *Swindell, Bankhead, & Co.*, of London. He heard nothing in a direct way about these Bills, nor did he receive any letter in reference to them. He did hear certain rumours afloat respecting them before the arrival of the Mail of 5th July; this induced him to go to Mr. *Carpenter* and tell him of the rumours he had heard, and that he believed the Bills would not be accepted, but in the event of their being returned he would be prepared to pay them, provided time were given him to do so. He told Mr. *Carpenter* that he had no positive information respecting them, but from a variety of circumstances he suspected that they would not be accepted. This conversation took place previously to the arrival of the 5th July Mail, and after that he received information that Mr. *Carpenter* wished to see him. He went to the Bank, and Mr. *Carpenter* told him that his apprehensions respecting the Bills were groundless, for if there had been any irregularity respecting them he should have heard. He then asked Mr. *Carpenter* if he knew anything of the responsibility of the parties on whom the bills were drawn. He said he knew nothing himself of the parties, but he knew a gentleman in town, who knew all about them, and he would make enquiries of him respecting them and let him (defendant) know. Mr. *Carpenter*, a little after, told him he had seen the person of whom he spoke to him and counselled him to make his mind quite easy about the acceptance of the Bills. He believed this took place after his proposition to pay the amount of the Bills. On some Saturday morning he received a message, that Mr. *Carpenter* wished to see him: knowing that the 5th July Packet had arrived, he suspected of course something about the Bills. He went down and Mr. *Carpenter* said to him that at last those unfortunate Bills had turned up. Mr. *Carpenter* was very busy on that day, and he told him that he would call again the following Tuesday to discuss the matter relating to the Bills; at the same time he expressed a wish that the matter might be discussed in the presence of Mr. *Murray*. Meanwhile he had received no notice of the non-acceptance of the Bills. At 11 o'clock he (defendant) went round to the Bank and entered Mr. *Carpenter's* Office, and they went together up to Mr.

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Murray's, who asked him what arrangements he meant to make with the Bank respecting the Bills of Exchange. He told *Mr. Carpenter*, that he would pay the Bills provided they would allow him to do so by instalments; and for the purpose of payment he would give a sealed note or notes and would deposit the title deeds of his store. He also proposed to make over his assurance policy to the Bank, but *Mr. Carpenter*, who was very friendly throughout the whole affair, said there was no necessity for that, for the security first offered was quite sufficient. Just about this time *Mr. Spooner*, a clerk in the Bank handed him (defendant) in the presence of *Mr. Murray* and *Mr. Carpenter*, a notice of the non-acceptance of the Bills. This was about 12 o'clock on the 23rd. As soon as the note was put into his hand, he turned to them and asked them how they could account for the delay. They said they could not account for the delay of the notice. He (defendant) then observed that there was more in connection with the transaction than he could then clearly see, and there must have been something wrong. This he said plainly, and added that he deemed it prudent to seek advice before going further. He then said that he would upon the instant seek advice, and that before he returned to the store he would report to them the result of the interview. He did seek advice and was told that beyond a doubt he was exonerated from all liability. He returned to the Bank and told them that: he then went to the store and wrote them a letter, copy of which was taken to the Bank by his clerk (*vide Mr. Carpenter's evidence.*) Inasmuch as that matter had been broached, he would just mention that on one occasion when he went to the Bank, as soon as he got upon the head of the stairs he saw *Mr. Taylor*, the Solicitor, slipping away. He thought it strange that he should be slipping away in that manner; he of course concluded from that circumstance that there was something which they were desirous of secreting from him.

Solicitor-General—Do you mean *Mr. Geo. N. Taylor*?

Defendant—I am speaking of that young gentleman sitting yonder (at the time pointing to *Mr. Saml. Taylor*, who was sitting opposite.) (Laughter).

Defendant continued—He did not see *Mr. Taylor's* face, he saw the figure, and judged it was he. When he made the proposition to pay the amount of the bills by instalments he was totally ignorant of the fact of the bills not having been duly protested, or any irregularity in connection with them. There were rumours abroad which caused him some anxiety concerning them. Soon afterwards they came back, and he then saw that the rumours were too well founded. His liabilities at that time at the Bank were upwards of \$160,000, exclusive of those bills of *John Jeffray & Co.*, which he did not intend to pay.

Cross-examined by the *Attorney-General*—It was somewhere about the first interview with *Mr. Carpenter* the rumours he had spoken of reached him, and it was then that he made the proposition to pay the bills if they should not be accepted. He believed he did put his views upon paper, as suggested by *Mr. Carpenter*, with a view of preventing him misunderstanding

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what he meant. He would undertake to swear that he did not tell Mr. *Carpenter* that he had been informed by the drawers that the bills were dishonoured. The letter of the 5th *July* is in his handwriting, and he did not doubt that as he promised to call next day he did, but he did not recollect that he did. Supposing he did go to the interview of the 6th *July*, he had no recollection whatever of it. He was an excitable man, and the mere rumour was sufficient to induce him to look after the matter.

Attorney-General—You are an excitable man? Yes, I am sometimes excitable, and any man under excitement is in a state of temporary insanity, and therefore might do things of which he has no recollection after. He did not for one moment mean to say that he did not write the letter of the 5th *July* then produced. It must have been written about the time he first went to Mr. *Carpenter*—he was induced to go several times to Mr. *Carpenter*, from the courteous manner in which he always received him. He could not recollect how many interviews he had with Mr. *Carpenter*. He would swear the conversation already referred to took place about the 5th, it may have been before or after. He would swear that he did not tell Mr. *Carpenter* that he admitted his liability. The conversation that took place between Mr. *Carpenter* and himself may have been about the note Mr. *Carpenter* sent him.

Re-examined by Mr. *Packer*—He was positive that when he went to Mr. *Carpenter*, after the arrival of the Packet, he told him (defendant) that his fears about the bills were groundless, for he had no notice of their being dishonoured. Mr. *Carpenter* did not tell him so at the next interview. He got a formal notice of it.

The *Attorney-General* replied at great length upon the whole case. He acknowledged with his learned friend that the issue was one of great importance, not only to the parties concerned—not only on account of the large amount involved, but it was of great importance in the interest of the whole mercantile community. His learned friend had observed that the Bank was a wealthy Corporation, and if the verdict should be adverse to them the loss would be divided amongst a great many, whilst, on the other hand, the loss would be that of one individual. Admitting that was so, one thing was clear; the defendant had pocketed their money, (*Sol.-General*: No, no—Messrs. *Jeffray*), and now sought, by dint of legal shifts, and *nisi prius* technicalities, to wriggle out of his liability and avoid making honourable restitution. But he had no doubt that the Jury would, regardless of the Corporation, or the individual, return a conscientious verdict. But, before doing so, he hoped they would contrast the straightforward, above-board manner in which Mr. *Carpenter* had given his evidence with Mr. *Crumpton's*. While Mr. *Carpenter* remembered every minute circumstance, Mr. *Crumpton* took refuge, forsooth, in his professed excitement at the period referred to, and seriously expected the Jury to believe that he could not remember even that very important letter of the 5th of *July*. He had no recollection whatever of that which was the most important piece of evidence in

the whole case. This was most singular, and he was sure that the Jury would bear in mind the evidence in connection with that point, and draw the only conclusion that could be drawn respecting it. The learned gentleman then contended at great length that the defendant's conduct amounted to a waiver and dispensation of notice, and held that the Jury were bound in view of all the circumstances of the case to return a verdict for the plaintiffs.

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CLARKE, C. J.:—This was an action brought by the Colonial Bank against Mr. *Thomas Crumpton*, to recover from him the amount of seven bills of exchange amounting to £5,640 which had been drawn by *J. Jeffray & Co.*; they were indorsed by the defendant, and were held by the Colonial Bank; they were bills drawn at 90 days sight; the Declaration contained four teen counts with respect to them, and two similar counts with respect to each bill—one of which described the bill to which it refers, and that the holders did everything that was necessary to entitle them to recover against the defendant on the bill. The other count after stating the same circumstances adds, “that at the time the bill was presented for acceptance and was dishonoured, the defendant waived and dispensed with notice of the presentment and dishonour.” To this declaration the defendant had put in six pleas; putting in issue all the allegations of the first counts on each bill, and declaring as to the 2nd count, that he did not waive and dispense with notice of presentment and dishonour. On all these pleas there is a joinder of issue. It would be convenient to consider these pleas as they applied to the two classes of counts in the Declaration. The first set put in issue the plaintiff's title, as it were, to sue—the fact of indorsement by the defendant—the presentment by the plaintiffs for acceptance—their non-acceptance; and that thereupon they were duly protested; and due notice of that and of their dishonour given to the defendant. The issue raised by the 5th plea he would deal with afterwards; and as the questions involved were not common in this court, it would be proper to make a few remarks on the general law relating to bills of exchange. The duty of the plaintiff in an action like the present was to prove the facts with reference to the bill which he had just noticed. And first with respect to the indorsement; the effect of which is a conditional contract on the part of the indorser to pay the holder or bearer of the bill in case of the acceptor's or maker's default; it was effected by the simple signature of the party being put on the back of the bill, and was not denied in this instance by the defendant. Next as to presentment for acceptance, this was necessary where the bill is drawn payable at a certain time after sight. Till such presentment there is no right of action against any party, and unless it be made within a reasonable time, the holder loses his remedy against the antecedent parties. There was no fixed rule as to time, for the presentment of such a bill: the law requires that the holder should use due diligence to put the bill in circulation; and whether this diligence has been used in any particular case, is a mixed question of law and

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fact; but the Jury would not be called on to decide this point as the plaintiffs had proved due presentment, and it was admitted. With regard to protests the law is, and that not by any express enactment, but rather by the custom of merchants, that in order to charge the parties to a foreign bill the non-acceptance of it, or the dishonour as it is termed, should be attested by a protest, as affording the most satisfactory evidence of its dishonour to those who from their residence abroad might experience a difficulty in making proper enquiries on the subject, and be compelled to rely on the information of the holder. The Courts in England receive a protest under the seal of a foreign notary as evidence of the dishonour of a bill. The Plaintiff in this case has produced two several protests with respect to each of the bills; the one showing that they were protested for non-acceptance on the 22nd of *June* 1861; and the other showing that they were protested for non-payment on the 23rd *September* following. The Counsel for the Colonial Bank had admitted that there was a failure, by reason of the delay of the protest for non-acceptance, and the Jury were authorized to consider that point as settled in favour of the Defendant. Next as to notice of dishonour. The general rule of law on this subject is, that it is incumbent on the holder of a bill dishonoured by non-acceptance, to give a notice of that fact to the antecedent parties to it. No particular form of notice is required. It may be written or verbal; all that is necessary is to apprise the party liable, that the bill in question has been dishonoured, and to intimate that he is expected to pay it. Thus it will be seen that notice means an actual notification; as was said in *Tindal v. Brown*, "it is something more than knowledge, because it is competent to the holder to give credit to the maker. It is not enough to say that the maker does intend to pay, but that the holder does not intend to give credit." The purpose of giving notice, is not merely that the indorser should know that the bill is not paid, for he is chargeable in the second degree; but to render him liable it must be shown that the holder looked to him for payment, and that he gave him notice that he did so; and this is necessary that he may have his remedy over by an early application. Indeed, so clear is this point, that mere knowledge is not legal notice; that it has been held, that even where a man can be clearly shown to have known beforehand that the bill would be dishonoured, he is nevertheless entitled to notice. So much for the form and requisites of notice. With regard next to the mode of transmitting it. Putting a letter in the post is the most common and safest mode of giving notice, and such letter may be addressed either to the usual place of business, or the residence of the party for whom it is designed. In the case of foreign bills of exchange, it is sufficient to send such notice by the first regular ship bound to the place to which it is to be sent. Now the evidence is, that the bills were presented on the 13th or 14th of *June* for acceptance in England, and were dishonoured; and that the regular mail for Barbados left England in the usual course of post on the 17th *June*, and there can be no doubt that notice of the dishonour of the bills was not sent either to the defendant or to the

Manager of the Colonial Bank here by that mail; and this is accounted for by the Manager here, as being occasioned by the carelessness of a clerk of the Bank in England. It thus became a point of primary importance in this case to state fully the law with regard to the time when notice of dishonour should be given. "The general rule of law," as laid down in *Byles* on Bills "is, that notice of dishonour must be given before action brought within a reasonable time, and after dishonour; and that what is a reasonable time is a question of law depending on the facts of each particular case." There are, with respect to inland bills of exchange, many decisions which define intervals within which such notice must be given. But there are few as to foreign bills; the principle, however, is the same; for the contract or engagement of the indorser being the same in each, the same consequences attach for want of due notice of dishonour, whether the bill be an inland or a foreign one. Now that contract is that if the drawee does not at maturity pay the bill, the indorser will, on due notice, pay the holder the sum which the drawee ought to have paid with such damages as the law prescribes: due notice therefore is part of the contract between the indorser and the holder; and it lies on the holder when plaintiff in such an action as the present, to show that such notice was given and received in due time before action brought; and if he does not prove this due notice, he must abide by the consequences of his neglect, which is a complete discharge of the indorser from all liability on the bill. With regard, however to this question in the present action, the plaintiff's counsel has candidly admitted that he has not been able to give proof of such notice and that he relies on the conduct of the defendant as having waived and released him from the necessity of such proof. His Honor said he would address himself to the second set of counts in which the question of waiver was put in issue. Before doing so, however, he would advert to a remark which had been made by the Counsel for the defendant, that the defendant was not in the opinion of the Jury to be prejudiced because he had taken advantage of what some persons might be inclined to think was a slip on the part of the Bank. It was his duty to tell the Jury that the defendant was legally justified in the course he had taken; that he appeared before the Court simply insisting on what, as he alleged, the law gave him; and when it was borne in mind what was the nature of bills of exchange, the enormous amount of money afloat in them, that they formed the greater part of the immense circulating medium of the commerce of England with the world, they must see at once that it was essentially necessary that there should be formal and precise rules respecting them and it was not less essential for the protection of the interests of commerce itself that these rules should be scrupulously adhered to, and the strict law regarding them rigidly administered. He was sure no such prejudice would exist on the minds of the Jury with reference to the defendant. There was another point to which he would advert before calling the attention of the Jury more particularly to the general body of evidence they had heard; it was to state his opin-

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ion that in point of law it was the duty of holders of dishonoured bills drawn in this colony on parties in England, to send notice of such dishonour by the mail which left England for Barbados next after the fact of such dishonour; that if they omitted a mail by which they had an opportunity of writing or giving notice through their agent, to the party authorized to receive such notice, they will have failed to use the due diligence which the law requires; they will have made the bill their own by their laches, and lost their remedy against such party. His Honor then proceeded to read the evidence, commenting on parts of it, remarking that in the letter of defendant of the 5th July, he only mentioned his knowledge of the non-acceptance of the bills; that with regard to the memorandum he left with the Bank, it certainly proved that the defendant thought he was at that time liable for the bills, and admitted that liability, and was desirous of making arrangements for taking them up when returned; that he made proposals for that purpose to Mr *Carpenter*, which proposals were not accepted by him, as he had no authority to accept any such terms without having communicated them to the Directors, and received their sanction. He also stated that there were some discrepancies between the statements of Mr. *Carpenter* and the defendant. He did not think they were very material to the actual issue they had to try, but it was for them to say what effect they would have on their decision. The Jury would recollect the Counsel for the defendant had, upon failure of proof of the notice of dishonour, moved for a nonsuit; and perhaps if there had not been the question of waiver put on record by the Plaintiffs, there might have been some ground for the motion. The facts put in evidence by the plaintiffs did raise that question, and it was one for their decision. He would state the law applying to it. It had been admitted that the Plaintiffs had failed in the proof necessary to establish their right to recover simply as holders of the bills. But, he continued, it is certainly competent to any party to waive a rule of law in his favour, or made for his protection; and the rule of law on this point with respect to bills of exchange is this:—Where a party is discharged from his liability by want of notice of dishonour, he will render himself liable if he makes a full and unqualified promise to pay the bill. And the reason why such subsequent promise operates as a waiver is, that it may reasonably be inferred from such conduct, that such promise would not have been made unless at the time all the circumstances had occurred which subject him to liability, and induce him to make such promise. It is on this principle that in many cases a promise to pay has been considered as evidence from which a Jury may presume that notice has been received and that it is *prima facie* evidence of that fact, but it is evidence only, and the Jury must judge of it. They are not bound to draw this inference, even where there is no evidence to repel it. They must believe the inference to be correct, or they cannot draw it; for a man can scarcely be supposed to design to part with a right, of the existence of which he was not at the time cognizant. The law is thus stated in *Byles* on Bills:—"But if the

promise or acknowledgement is made under a misapprehension of fact, as if the bill have been presented for acceptance, and acceptance have been refused; a promise to pay in ignorance of that circumstance, is no waiver of laches." So also with regard to want of notice of dishonour. The Jury had heard many cases read to them on this point by Counsel on both sides. He would refer to two only—the case of *Woods and others vs. Dean*, relied on the Counsel for the plaintiff, and that of *Pickin vs. Graham and another*, by the Counsel for the defendant. The former case was one somewhat similar in its circumstances to the case before the Jury. The evidence relied on by the plaintiffs was a conversation of the defendant, who had not received notice of dishonour; and the question for the Jury was whether the defendant had waived his right to notice by a subsequent promise to pay. The Jury were of opinion that he had; and on a motion for a new trial, which was refused, *Blackburn J.* said,—“After the authorities of the text books *Story* and *Byles* and no authority cited to the contrary, we may take it as clear law that where a promise is made by an indorser with full knowledge of the fact that no notice of dishonour has in effect been given, that is equivalent to saying that he will not take advantage of his not having had notice, or in other words, it is equivalent to a waiver of notice.” And this is the law according to which I shall presently direct you to your verdict.

In *Pickin vs. Graham* there had been a nonsuit on the ground that the plaintiff had not given due notice of dishonour; and a motion was made, with leave, to enter a verdict for the amount of the bill, if the promise made in conversation by the defendant was sufficient to dispense with notice of dishonour. The defendant had called on the plaintiff before notice of dishonour had reached him, and it was upon the conversation which then took place with respect to the distressed circumstances of the acceptor that the defendant, the endorser said:—“If that be so, I suppose that there is no alternative but for me to take up the bill; and if you will bring it to me at Sheffield next Tuesday, I will pay it.” It was contended for the plaintiff that though the defendant had no actual notice, he had knowledge of the expected dishonour, and with that knowledge promised to pay, and that this was an unqualified promise to pay. But it was the opinion of the Court, that there was a wide distinction between knowledge and notice, as applied to bills of exchange,—and that where a party held such a conversation about a bill, believing that he had no alternative but to pay, and contemplating a regular notice of dishonour, the promise to pay would not amount to an absolute promise to pay the amount. A case was referred to by the Court in which Sir *James Mansfield*, in delivering his judgment, said:—“I do not find any case in which an indorser, after having been discharged by the laches of the holder, has been held liable on his indorsement, except where an express promise to pay the bill has been proved. Now the defendant's letter contains no such promise, but in a great measure shows that the defendant was writing under the supposition that he was liable.” He afterwards said:—“I cannot

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consider the letter as conveying an absolute promise to pay at all events, and I think in this case it would be too much to fix the defendant by any such implied promise." And *Vaughan, B.*, adds:—"In most of the cases where the defendants have been held liable, they have either made an express promise to pay, or a promise when they had a full knowledge at the time that they were discharged; and other cases show, that a promise made without knowledge of the laches is not binding, and does not estop the party from insisting on a discharge on account of it. I am, therefore, of opinion that this plaintiff was rightly nonsuited. It was here admitted that no regular notice of dishonour was given. Then, does the admission or promise dispense with the necessity for it? I think not, for it took place before the dishonour could be known, and was not absolute." And this was, in effect, the question which the Jury would have to answer.

There was only one other point to which he would allude: the proposal by the defendant to pay was conditional, and was not accepted by *Mr. Carpenter*; indeed, he stated he had not authority to accept it without the sanction of the Directors; and in such a case it is quite clear that if *Mr. Carpenter* had had authority to accept the defendant's offer, and had accepted it, good and well; if not, things would remain on the same footing as before it was made.

He would not trouble the Jury with any other remarks. They were to understand that in consequence of the omission to give due notice of the dishonour, the defendant had been discharged from all liability on the bills, and the question for their decision would be, whether by his words and his writings and his acts, in short, by his conduct, he had made an absolute promise to pay at all events. If they thought he had done so, it would be a waiver, and they should find for the plaintiffs. If, on the contrary, they were of opinion that when he admitted his liability to pay and offered terms to *Mr. Carpenter*, he was ignorant of the laches of the plaintiffs and had not received, or did not know that they had omitted to give due notice of the dishonour of the bills; then the admission and offer made under such circumstances would not be binding on him, and would not prevent his taking advantage of the discharge from liability which the negligence of the plaintiffs had provided him. And if such was their opinion on the evidence before them their verdict should be for the defendant. His honour said that since he had heard the evidence he had written down the questions he intended to submit to the Jury, and he would read them now, in order that the Counsel on either side might have an opportunity to make any suggestion with reference to them, which he would readily consider. On the questions being read, the Counsel for the defendant suggested that the word protest should be added to the first question, to which his Honour assented. The Counsel for the plaintiffs said he had no suggestions to offer. His Honour then read to the Jury the questions he had written, and which they were to answer by their verdict:—

1. Was the defendant aware of the fact of the want of pro-

test and due notice, when he had the interviews and wrote the documents produced in evidence?

2. Did he mean, when he spoke of his liability, to waive all legal objections which he might be entitled to take?

3. Did his conduct amount to a waiver of want of notice of dishonour?

These questions were subsequently given as written to the Jury.

Verdict for the defendant.

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SPRINGER v. EVELYN.

(*In the Assistant Court of Appeal*:—Justices TINLING & KING.)

Dr. CHARLES EVELYN Appellant.

Mr. JOHN SPRINGER.....Respondent.

This was an appeal from the decision of Mr. Police Magistrate Kerr, of Christ Church, with whom a complaint was lodged by the respondent against the appellant for not having made a Return to him as Clerk of the Commissioners of Roads, of lands, horses, and carriages in accordance with the requirements of the 10th section of the Highways Act.

On appearing to the summons the appellant (defendant in the Court below) through his Counsel, Mr. *Reeves*, objected to the Magistrate's exercising jurisdiction on the following grounds:—

1.—That he was Parochial Treasurer of the parish of Christ Church, and as such was vested with the functions and authority which the complainant claimed to exercise. 2nd.—That he had not declined to enter upon the duties cast upon the Parochial Treasurer by the Highways Act, or refused to comply with its requirements. 3rd.—That the question whether the complainant was rightfully entitled to the office, which he then claimed, was pending in the superior Court, which alone had jurisdiction of the subject matter.

The Magistrate after going into evidence, decided to overrule the objection, on the ground that the respondent (complainant in the Court) had been actually appointed to the office of Clerk to the Commissioners on the 30th of April, before the letter of the appellant offering to assume the duties was received by the Commissioners. The Magistrate then convicted the appellant, ordering him to pay double the amount of tax on one four-wheel carriage, one cart and one horse, amounting to £2 2s. with costs of complaint seven shillings.

From this decision Dr. *Evelyn* appealed.

Mr. *Reeves*, who appeared for the appellant, said he appealed from the decision of the Magistrate for the following reasons:—

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Firstly—Because he ought to have declined jurisdiction; and Secondly—Because the respondent did not show affirmatively, as he apprehended, the nature of the issue raised required, that he had been appointed Clerk of the Commissioners of Highways in a regular and legal way.

Justice KING—I believe, Mr. *Reeves*, there is no dispute about the facts; the only question is the legal one raised before the Magistrate, and again raised here to-day.

Mr. *Reeves*—Just so, Sir.

Justice KING—The question then before the Court is narrowed to a small compass. We quite admit that the question of jurisdiction is one of great importance, and it must be decided before the second point can at all arise. And I will observe that we need scarcely say that it was not enough to oust the jurisdiction of the Magistrate for the appellant simply to say that he was entitled to the office and not the respondent. It must be shown by him that he raised the objection *bonâ fide* and that it was not merely colourable. The learned counsel would recollect the case of *Rex v. Wrottesley* 1 B. & Ad., 648, where objection having been made to the validity of a church rate, the Justices declined jurisdiction and a rule for a mandamus was moved for. In that case Lord Ellenborough observed that “a person merely saying before Justices that he disputed the rate would not be sufficient; he must show something to manifest that he disputed it *bonâ fide*.”

Mr. *Reeves* perfectly understood that, and knew the case cited by his Honor. There was another case in the 23rd Law Journal. [Justice KING—Just so;—it is here.] The objection, continued the learned Counsel, was not merely colourable to defeat the provisions of the Road Act; but was raised before the Magistrate *bonâ fide*.

Mr. *Reeves* then addressed himself to the objection taken by him to the Magistrate's exercising jurisdiction in the case. The learned counsel said, the Court would perceive on looking at the Highways Act under which these proceedings were taken, that it was the policy of the Legislature that the Parochial Treasurers of the several parishes should discharge the ministerial duties prescribed therein. The Act in fact vested the right of undertaking these duties in the Parochial Treasurer of each parish, and he could only be divested of that right by its being affirmatively shown that he had declined to discharge, or had neglected to comply with the conditions on which alone he could be allowed to discharge them, or indeed enter upon the office at all. Now, the appellant was Parochial Treasurer of Christ Church, and there was no doubt that although he did at first decline to enter upon the duties, it was equally clear on the face of the proceedings that—before the 6th May when the respondent was, at a meeting of the Board of Commissioners, formally installed in the office of clerk—the Parochial Treasurer did write and signify to the Chairman his readiness to enter into bond, and assume the duties. There was something in the evidence about the Chairman having, together with another Commissioner, appointed the respondent on the 30th April; but he

contended that it not having been done at a meeting of the Board it was no appointment at all; that if there was any appointment it was not before the 6th May, three days after the receipt of the Parochial Treasurer's letter. Whether so or not; at any rate the question was one of great importance. It was a purely legal question to be decided by a different Court altogether; and the moment the Magistrate was satisfied that the question, whether the appointment was a legal one, was raised *bonâ fide* by the Parochial Treasurer, he ought at once to have declined jurisdiction, on the broad principle that a question of title had arisen, and the jurisdiction of the inferior Court was ousted. Dr. *Evelyn* had, before the summons was issued, commenced proceedings against respondent for usurping the office, and Mr. *Springer* had received notice to that effect from Dr. *Evelyn's* solicitor, so the real object of the summons was to get a decision in a Court of inferior jurisdiction of the important legal question at issue. Now Dr. *Evelyn* could not have made a return to Mr. *Springer* without acknowledging that he was legally in the office, and if the Police Magistrate of Christ Church had jurisdiction of this question, involving right to an office like the one in dispute, then he (Mr. Reeves) could only say that some of the nicest distinctions recognized by our Jurisprudence would be altogether overwhelmed and confounded. As well might a Judge of a County Court (supposing the County Court had jurisdiction in debt or damages to the extent of £100) determine on an action to recovery the penalty, whether the learned Judges for instance of the Common Pleas or those of any one of the superior Courts sitting at Westminster had properly refused a subject his Habeas Corpus. As for any objection that it would lead to great embarrassment if this objection to the Magistrate's jurisdiction was sustained:—why there was nothing in it. Mr. *Springer* being in the office, his title was good against all the world, except the Parochial Treasurer, and nobody in the parish summoned by him under the Act would be allowed to question his right to the office. The Magistrate should have refused to adjudicate, leaving the Commissioners to sue out their mandamus if they had thought proper. At any rate, the Magistrate had, he (Mr. Reeves) submitted, on plain principles of law, exceeded his jurisdiction, and his judgment must be reversed. The point was almost too plain to render it necessary for him to cite any cases, and moreover the Court had already referred to those he should have cited. The learned Counsel concluded by saying that the decision of the Court below must be reversed for want of jurisdiction.

Justice KING said that the Counsel must show that the objection was *bonâ fide* on the part of the appellant, whereupon.

Dr. *Evelyn* was sworn and his deposition before the Magistrate, made under protest, was read over and confirmed by him. It was,—That he possessed one four-wheel carriage, one cart, and one horse. He did not pay taxes on land, and no assessment of his lands had been called for according to the 8th Clause of the Highway Act, although the assessment had been properly and legally made. He had been Parochial Treasurer

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of Christ Church since September 1853. He had not made the return required by the 10th clause of the Act because he did not consider the complainant legally entitled to receive the return.

By Mr. *Reeves*—Immediately on the receipt of the letter of the 9th of May [letter from Mr. *Ashby* stating that the Commissioners had appointed Mr. *Springer* their Clerk], he wrote to inform Mr. *Ashby* that he would take proceedings to ascertain whether Mr. *Springer* (respondent) was properly in the office or not; and before any other communication passed between Mr. *Ashby* and himself he sought his solicitor Mr. *Chapman*, and retained as counsel the Solicitor-General and Mr. *Reeves*. These proceedings were still going on *bonâ fide*; he had not abandoned them. He was not aware, however, whether the declaration had yet been filed.

Justice KING (good humouredly)—When a man puts his hands in his pocket and retains counsel, that is the best proof of his *bonâ fides*.

Mr. Justice KING delivered the decision of the Court upon the objection to the jurisdiction raised by Mr. *Reeves* :—

In this case as I have already said, there does not appear to be any fact in dispute. It is a mere preliminary question whether the Magistrate presiding in the Court below, had any jurisdiction empowering him to adjudicate. Now, having carefully considered the case and listened to the argument of the Counsel who appears for the appellant, we have only to observe that it is clearly laid down that when an objection is raised to the jurisdiction of an inferior court, the presiding officer is authorized to go so far into the case, as to ascertain whether or not he has jurisdiction. When therefore, as in the present case, it was objected that the Magistrate's jurisdiction was ousted by reason of a question of title being involved, he was called upon to be satisfied that the objection was *bonâ fide* and not merely colourable—put forward to stop the proceedings, and to defeat justice. We think, therefore, in view of these proceedings, that Mr. *Kerr* was right to a certain point. But the moment he examined the appellant, the defendant in the Court below, and was satisfied that he contested the respondent's title to the office, in good faith, he should have stopped for the want of jurisdiction. There is no doubt about the *bonâ fides* of the appellant in raising the question and objecting to the jurisdiction; and it is a general principle of law that where a right is set up substantially the jurisdiction of the inferior court is at an end. This universal principle is distinctly recognised in many of the local statutes giving Magistrates jurisdiction—in the Petty Trespass Act, for instance, and the Petty Debt Act recently passed, it being expressly provided in the last mentioned Act that the Magistrate shall not exercise jurisdiction when any right to any incorporeal hereditament, franchise, &c., &c., should be in question. And in this case where no special jurisdiction is given to the Magistrate of the subject matter in issue, the general principle to which I have alluded must be taken to apply. Mr. *Kerr* has undertaken, notwithstanding, not only to exercise jurisdiction, but also to decide that the respondent was duly appointed

to the office in dispute. It is a question which we would be very sorry to sit here to decide; but Mr. *Kerr*, it would seem, has felt no difficulty about it. Now, in the case of *Stephenson v. Raine*, 23 L.J. Q.B. 62, which I told the learned counsel, Mr. *Reeves*, I had before me upon the table, the question was as to the right of a parish clerk to recover in the County Court a certain yearly customary sum, incident to the office from a parishioner and householder. Defendant objected to the Court's jurisdiction on the ground, among others, that plaintiff had no title to recover as his appointment to the office was not valid. The Court adjourned the hearing to a future day, and meantime a rule for a Prohibition was applied for, and after argument was made absolute, the Court of Queen's Bench deciding that a question of title to an incorporeal hereditament was raised *bonâ fide* and that the County Court had no jurisdiction. The arguments were conducted by *Bowling*, who shewed cause, and by *Bovill*, who supported the rule; and the law was thus laid down by Lord Chief Justice *Campbell*: "This being a personal action it is *primâ facie* maintainable in the County Court; but the defendant contends that it comes within the section of the Act providing that the Court shall not have cognizance of any action in which the title to any corporeal or incorporeal hereditaments &c., shall be in question. In construing this language, we are of opinion that this is an action in which the title to an incorporeal hereditament is in question.....There seems no doubt that this is a tenement, because it is holden for life. But according to the legal definitions which have been referred to, as lands comprehend all tenements, so hereditaments comprehend all tenements. And looking to the object and framing of the proviso, we are of opinion that the Legislature here uses the word in that extensive sense, and meant to exclude the trial of title to such an office from the jurisdiction of the County Court and Judge." Here is a case almost on all fours with the case before the Court; and looking to the extensive definition of incorporeal hereditaments laid down by Lord *Campbell*, and having regard to the general principle of law before referred to, there is no doubt that whether the right to the office now in dispute be tried by means of an information in the nature of a *Quo Warranto*, to which the Counsel for appellant has made reference, or by an action for money had and received to the use of the appellant, it is a question for the Common Pleas. When we look at the wording of the Highway Act, we find that every person liable is to make a return to the Parochial Treasurer; therefore he is *primâ facie* the person to whom the return is to be made. But the 15th section provides that should it happen that the Parochial Treasurer decline to undertake the duties or neglect to perform them or refuse to enter into bond or give the required security, then the Commissioners may appoint some fit and proper person to the office. Now Dr. *Evelyn* denies that he declined to undertake the duty or has done anything which would justify the Commissioners in appointing some other person; he contests the right of the

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respondent to hold the office; he has taken legal proceedings to try the right in a court of competent jurisdiction, and has retained counsel. The court is satisfied of his *bonâ fides*, and has no alternative but to admit that the objection of the learned counsel is well founded. The decision of the Court below is therefore reversed, and the case dismissed, for want of jurisdiction. There is a higher court to which the case may be carried, and I can only say that it is always satisfactory to this court to have its decisions reviewed by the Court of Error.

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(In Bankruptcy, May 16th 1865.)

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 ———
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On Tuesday 16th May his Honor (Sir R. B. Clarke, C.J.) pronounced the following judgment:—

In this case the Insolvent had been a trader for 28 years. First, for a short time, as partner with *John Monroe & Co.*,—then, from 1839 to 1853 on his own account. In 1853 he took his brother *G. KilKelly* into partnership, which continued till the end of 1863—when it was dissolved, and he then resumed business on his own account, and continued it till his failure in December 1864. He carried on a large general business, buying and shipping produce on his own account, and also on commission. In 1859 he got the agency of *Gibbes, Bright & Co.*, and from time to time had advances from them. In 1846 he made a shipment of aloes to a house in England, which failed. *Gibbes'* house took up the bills, amounting to between £4,000, and £5,000, for his honour; thus began his debt to them. He confessed a judgment to *Gibbes, Bright & Co.*, in 1846. In 1847 the West India Bank failed—he lost by that; and his liabilities to them were about £4,000.

In 1853 he took his brother into partnership without any capital, and opened a new set of books. In the capital account in these books, he credited himself with \$37,900—being stock-in-trade and debts from the old books, and debited himself with \$17,400. There were other debts not transferred, \$18,000 on account of bills payable; a debt to *Gibbes'* house of £6,000; a trade debt to *Gibbes*, of \$17,000; this was, however, entered in the course of the year; and a debt due to *Ross & Ash*, of \$8,000, which also was entered in August of that year. All these were omissions, which should have appeared on the face of the new books, and would have shown that, independently of the debt of £6,000 to *Gibbes*, the new concern, at its commencement, was heavily in debt, instead of having a capital, as the books showed, \$20,460. The stores owned by the Insolvent were never made partnership property, and still remain his private property.

In 1856 the firm got the agency of the guano business which was a very profitable concern in itself. The contract was held by *Anthony Gibbes & Co.* *Gibbes, Bright & Co.* obtained it for the firm, and became sureties for them. The result was,

that on the winding up of the guano concern, notwithstanding the profits, they were indebted to *Anthony Gibbes & Co.*, £10,183. This arose, chiefly, from the Insolvent omitting to remit the proceeds of the sales of guano to the contractors as they were made, and the interest charge on the sums so omitted. He kept a separate account at the Bank of these sales; and the main cause of these omissions seems to have been, that he frequently drew on the guano account to square his general Bank account, on the 15th or 30th of the month. In 1863 the partnership with his brother was dissolved; and he was found indebted to the concern about \$24,000, from which he was released. His brother had been spending more than his profits, and his reason for dissolving, was the hope of saving the amounts drawn out by his brother. The result of this partnership on its dissolution in 1863, was as estimated by the Official Assignee in his report, a great deficiency of assets. In 1864 the Insolvent carried on business on his own account, and appears to have speculated largely in produce, especially in sugar, and to have met continuously with loss.

On the failure of the Insolvent in *December* 1864, proceedings in this Court were instituted against him on the 9th of that month, at his own request by one of the creditors. It appears from the report of the Official Assignee, that his liabilities amount to £38,000, and that if the judgment creditors are paid in full there will not be any assets for the general creditors.

I have thought it best to give this outline of the affairs of the Insolvent before entering into the specific charges contained in the allegations. It shows that from 1853 at least, he was not in solvent circumstances; and the guano contract, safe and profitable as it was, was so dealt with by him as not to have improved his condition, but when wound up in 1863, to have resulted in a debt to his principals, Messrs. *Gibbes & Son*, the contractors, of £10,183.

I come now to the allegations: there are eight in number. During the hearing the 3rd and 6th were withdrawn. The 1st, 2nd, 5th, and 7th are under the 20th clause of the Act, the 4th is under the 12th, and the 8th under the 10th clause. I shall consider them first as they relate to the granting to, or withholding from the Insolvent, the benefit of the Act which mainly depends upon the information derived from his books; and secondly as they are penal in their consequences if the conduct of the Insolvent be brought within their terms.

With regard to the first class, the fourth allegation charges, that during the time the Insolvent carried on his trade "he did not keep such books of account as enabled the Official Assignee to obtain a correct and full knowledge of his affairs."

In support of these allegations much evidence was produced. The Official Assignee reports that on the whole the general books were very well kept, with the exception of some entries having reference to the guano books, one of which was evidently forced to make the books agree, and that after a very laborious examination the omissions were discovered, and the necessary correcting entries being made, the one alluded to as

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being forced was found unnecessary as the two sets of books agreed." Mr. *Bibby* whose valuable assistance the Official Assignee acknowledges, when examined, stated that the profits of the guano business were not correctly transferred to the general books, "the commission made was entered in the books, but the debts against that commission were not, so that the account was not correctly set out in the books." He also stated that "the books were not fairly kept, especially as to the guano business—this account should have been closed every year, and the balance brought into the general books, which was not done." The result also, he showed, would have been a very considerable reduction in the apparent profits of that particular account. Again with regard to the forced entry reported by the Official Assignee, the clerk who kept the Insolvent's books, was called to explain it, but I think failed to do so satisfactorily; and on Mr. *Bibby's* being recalled as well as the Official Assignee, they both repeated their testimony, that it was a forced entry, and prove the correctness of their statement by the fact that the books balanced without it. I notice this point with particularity, because I should omit my duty if I passed over in silence the evidence on this head, and left it to be inferred that the books containing such omissions were in my opinion well kept. I hold it to be necessary to the correct and successful carrying on of any mercantile concern, and especially of large transactions, that the books containing them should be accurately kept: experience has shown that the merchant who neglects his books, neglects the most important part of his business, and throws aside his truest friend; for by correctly keeping and consulting them, can he alone learn from time to time the actual condition of his affairs. It is also, although the Act does not lay it down in terms as a condition, the best means to the end required by the Act, for entitling an Insolvent to its benefit, for it is the only mode by which he can "enable the Official Assignee to obtain a full and correct knowledge of his affairs." Fortunately for the Insolvent, notwithstanding these omissions, his books, and it matters not with how much labour, have fulfilled the condition required by law; and have given as reported by the Official Assignee the information required to obtain a knowledge of his affairs. I consider therefore, that the fourth allegation has not been proved.

The eighth allegation charges that the Insolvent did not "lodge in the office of the Official Assignee a schedule of his estate and effects, and balance sheet showing a true statement of all his liabilities and assets." Now although this is substantially proved, as the balance sheet shows, yet I think the explanation given by the Insolvent that he consulted the Official Assignee on the subject, and he told him it was not necessary to classify the debts, is entitled to much consideration. No doubt the Assignee knew that he could correct any mistakes or supply any omissions by referring to the books: and although this did not justify or sanction any omissions of importance from the schedule, I cannot attach much blame to an Insolvent, who seems to have believed he was acting on the advice of the Offi-

cial Assignee, even where he may have misunderstood that advice.

The fifth allegation has also reference to the books, and charges that the "Insolvent kept false books, and made therein divers false entries; and withheld or caused to be withheld divers entries therefrom." The charges with regard to keeping false books and making false entries therein, were withdrawn, and I think properly so, there being no evidence to support them. And with regard to the withholding entries, there is no doubt that there were some large entries which when the new partnership was entered into in 1853 were not carried into the new books from the old ones; of these there were four, two of which however, were entered in the course of the year, and the reason given for omitting to enter them at the time of opening the new books was, I think, satisfactory: that they were English accounts, and the information to enable the amounts to be ascertained, had not then come from England. With regard to the account of bills payable, amounting to \$18,000, and the debt of £6,000, due to *Gibbes & Bright*, no sufficient explanation was given, and as the effect of such omissions was that the true position of the new concern was not shown on its books, I am bound to consider, though I believe no fraud was contemplated or intended—for the old books were at hand to detect it—that this part of the allegation is sustained.

The second allegation charges that the Insolvent "lived extravagantly and beyond his proper means during the time he exercised his trade." It is framed on the provisions of the 20th clause. The evidence shows that during the whole period of the partnership, the Insolvent who is a bachelor spent more than £1,000 in each year; while his partner drew for a similar amount; that while the firm was, chiefly by means of the guano contract, making about \$7,000 a year, \$10,000 was annually drawn for the private expenses of its two members. Now, considering that the Insolvent knew that he was insolvent, I cannot but think that this was far beyond what he was justified in spending; and looking also to the facts that he was a bachelor, and that his brother and himself were spending far more than the business cleared, I am bound to consider that he lived beyond his means. It is clearly the duty of those who live out of the *proceeds* of a mercantile concern, to be guided in their expenditure by its *profits*.

I will now consider the 7th allegation, which charges that the Insolvent "contracted a debt to the amount of £10,183 with Messrs. *Anthony Gibbes & Co.*, fraudulently and by means of a breach of trust." This allegation charges as one offence what the Act divides into two—the words of the 20th clause being "in case it shall appear to the Court that the Insolvent shall have contracted any debt fraudulently; or by means of a breach of trust; or by means, &c." In each case it is a substantive offence, and I must deal with it accordingly. First, as to its having been fraudulently contracted. To ascertain this we must look to the mode in which it was contracted. It was sworn by the Insolvent that he furnished to Messrs. *A. Gibbes & Son* half

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yearly accounts of the guano sale : and it was also sworn by him that this debt was solely owing on the guano account ; and this is verified by the Official Assignee and by Mr. *Bibby*. It was, in fact, a debt arising from omissions on the Insolvent's part to remit the whole of the proceeds of guano sales, for which he kept a separate account at the Bank, and on which he drew frequently to square his fortnightly accounts there. Thus it was a debt not at once, but gradually contracted ; and if the accounts furnished by him to his principals were correct, and there is no statement or evidence to the contrary, it was so contracted with the knowledge of his principals. Had it been a debt which only became known to them on the winding up of their accounts at the end of some years, it would have stood in a very different light ; but accumulating, as it appears to have done under their own eyes from year to year they must have been aware of it, of its existence and of its cause ; it is thus wholly free from that great ingredient in all fraud, secrecy or concealment ; and I am bound to say that I cannot consider a debt so contracted, as fraudulently contracted.

Again, with regard to its having been contracted by means of a breach of trust ; undoubtedly it is true, as a general proposition, that if an Agent applies to his own uses moneys belonging to his principal and entrusted to him for other purposes ; or if he applies to his own use the proceeds of the sales of goods which he ought to have remitted to his principal, he *prima facie* commits a breach of trust ; but, if as in the present case, it appears that such appropriations have been regularly or frequently made in a course of dealing running over a period of seven years, with the knowledge of the principal, it must be inferred to exist with the sanction of the principal ; and I do not think it competent for third parties, in the absence of that principal, or of any communication with him, to say that such appropriations were necessarily breaches of trust ; and that they are sufficient to inflict on the party the penal consequences attaching to them by the Act. It was doubtless in view of these circumstances, that the fact that neither Messrs. *A. Gibbes & Son*, nor Messrs. *Gibbes & Bright* took any part in these proceedings against the Insolvent, and that the latter, who paid this debt as sureties for the Insolvent, still continued their confidence in him, was proved and pressed on my attention by the Counsel for the Insolvent. It must also be recollected that both of these are criminal charges, with respect to the proof of which, no doubt must exist,—and I have no hesitation in stating that, in my opinion, the evidence is not sufficient to support either.

I now proceed to consider the only remaining, but unquestionably, the most important charge to the Insolvent,—the first —“That he, being in insolvent circumstances, contracted considerable debts, and more particularly, the several debts mentioned in the allegation ; not having, at the several times, when the same were so contracted, any reasonable or probable expectation of paying the same.” The debts enumerated are due to nine parties on promissory notes—and one to the Colonial Bank for \$11,547. The notes are twenty four in number,—their dates

range between the 2nd September and the 21st November last, and their total amount is over \$31,115.70.

In this inquiry it will be necessary to consider the trade transactions of the Insolvent from the commencement to the close of the past year. The first question, however, is, whether at the time he contracted these debts he was in insolvent circumstances. That he was so is reported by the Official Assignee and was abundantly proved by the examination of his books; which show that at the time of his adjudication as an Insolvent on the 9th December last, his liabilities were upwards of \$182,000: and in the opinion of the Assignee "his assets will not satisfy the judgment debts; and the open account creditors will get nothing."

The Official Assignee also in his evidence has sworn, that "the books do not at any time show, that he was in a position to pay his creditors, during the partnership," and this condition of his affairs was palpably made known to the Insolvent, at the winding up of the partnership at the close of 1863. Yet with this knowledge he speculated largely in various kinds of produce and especially in sugar, in 1864. He stated that with regard to the latter article, he had entered, in 1860, into an engagement with Messrs. *Hume, Burnley & Co.*, of London, to send them annually certain quantities of sugar; that he obtained from them a large advance of money in that year on assigning to them certain securities which he held against the *Lodge and Friendship Estates* in this island; that he bought sugars in the market here, and consigned them in accordance with this agreement, "the results being in 1861, a very heavy loss; in 1862 a loss; in 1863 a loss of about \$3,800; that he does not know the result of the shipments in 1864, as much of the sugar is on hand, that his engagements for that year was for 400 hogsheads, but he shipped them 500; that he purchased it here at prices varying from £25 to £20 the hogshead, and as the price of sugar has fallen since very considerably, he must be a large loser on these transactions. Now, with regard to the debts mentioned in the allegation, which were nearly all contracted within three months of the adjudication of insolvency; they are on Promissory Notes, which he gave for various kinds of produce; which in most instances he shipped, not waiting for any returns from such shipments, but drawing notes, through the Bank, on them in liquidation of his account there.

Next, it appears that the debt due to the Colonial Bank at the time of the stoppage was \$11,547: it is not necessary to say further of his dealings there, than that of late when he was unable, from notes obtained in the mode just stated, or from his other sources, to meet his half monthly liability at the Bank, he borrowed cheques from friends; paid them into his account, and drew the amounts out a day or two after. Mr. *Carpenter* states that he called the insolvent's attention to the state of his account, showing the debt above mentioned; when he told him "it was all right, and he would be able to meet it on settling day;" but that he did not do so. He also stated that he differed from the generality of the Bank customers. He borrowed cheques, and drew on them the next day or immediately after;

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which, he added, he hoped was not usual. This needs no comment.

The answers given to these facts were principally three. First, that he was induced by representations made to him from England early in 1864, by friends on whose judgment he relied, to speculate largely in sugar, and expected large gains: and that his losses by reason of the fall in its price are not to be attributable to him. This, to a certain extent, is true; but it affords no justification for his entering into such large speculations in an article in which he had already been so great a loser, and which he admitted he knew was so fluctuating in its value; when he knew that if the speculation failed he had not the means to meet the loss. There was no necessity either when under an engagement to ship 400 hogsheads, to send 500. Looking to the fact of his insolvency being well known to himself, these sugar transactions have been rightly described as reckless trading. But to apply them to specific charges in relation to the notes mentioned in the allegations. The oldest date of any one of them is the 2nd of September. At that time the greater part of the sugar was unsold; the price had most materially fallen; a large loss was certain—a loss he knew he could not meet. He could, therefore, have had no reasonable expectation of paying these notes when due, out of the hoped-for gains, for at that very time they were turned into loss. The next is, that he expected during all this time that Mr. *DeMora* would go away, and that he would again get the guano contract, the profits of which would enable him to recover himself. His evidence on his re-examination on this point was: “*DeMora* arrived here in 1863, and has not been away since: he came here with the intention to make me the agent; he has not done so for some reason or other.” It is very probable that the Insolvent has believed he would be appointed agent; but when one looks at the facts and results of the late guano contract and finds that though the new company wrote to him, and the first ship under the new contract was consigned to the Insolvent, nevertheless shortly after a new agent was sent out by them, on whom the whole responsibility devolved; and that although the premises and services of the Insolvent were judiciously secured by the agent for conducting the business through its accustomed channels, that agent yet remains here as agent; I think there are good grounds for questioning the soundness of the Insolvent’s belief in again obtaining the conduct and benefit of that agency. But even if it were better founded than the circumstances seem to warrant, the fact remains, that, as at the time of contracting the debts due on these notes, he had not [this agency, it could, by no possibility have afforded him any just or reasonable expectation of paying them at maturity; nor could any profits arising from its actual possession, have enabled him to do so. It is, therefore, no sufficient answer to the charges of the allegations.

The third is, that he expected the sum of £3,000 through the *Hindoes* from Messrs *Hume, Burnley & Co.*, on the securities they held against the *Hindoes*. Recollecting that these securities were assigned by the Insolvent to the house in 1860, as securi-

ties for an advance to be paid off by the shipment of sugars,—that the Insolvent has sworn that he lost considerably in each year on the sugars shipped under this agreement for the three first years; and must be a considerable loser on those purchased and consigned to them by him in 1864. I think that he could have had no real hopes of assistance from that quarter. Indeed, the Insolvent has himself set this point at rest, for in his examination he swore that these securities “were still held by Messrs *Hume, Burnley & Co.*, that they will go to them; that the creditors will get nothing; and that *Hume, Burnley & Co.*, will be creditors still.” It is impossible to believe that there was under such circumstances, any reasonable expectation of meeting these notes from that source. There are no other facts or explanations which have any bearing on this allegation, and I am of opinion that it is completely proved.

I have thus gone carefully and most anxiously through the evidence applicable to the charges in the allegations. I find that with respect to those having relation to the books, although their condition is not so satisfactory in all respects as it might have been; yet they are such as satisfy the requirements of the Act, since from their contents, the Official Assignee has been enabled to obtain a full knowledge of the Insolvent's affairs; and consequently that I am not debarred from granting to him the benefit of the Act. And this is so unusual an occurrence in this Court, that I shall not fail to mark very decidedly my sense of its importance to those who are brought before it.

It is satisfactory to have had the charges of keeping false books and of making false entries in them withdrawn; and that those relating to the contracting a debt fraudulently, or by means of a breach of trust, have not been sustained by any evidence. I must also express my opinion that the answers of the Insolvent on his examination were frankly and truly given.

It would have been well if the proof of living beyond his means had been less sufficient; but I confess that looking to the position he held among the mercantile body I should not feel justified in putting the penal provisions of the Act into execution against the Insolvent on this score alone.

This duty however, painful as it is, must be performed with reference to the charges contained in the first allegation—they are fully proved. One of the chief objects of all bankrupt laws is to prevent the trader really in a hopeless state of insolvency from continuing to speculate and deceive others, until he has got to the end of his credit, and consumed the last remnant of his effects, leaving nothing to be shared among his creditors. It is to prevent this that the law makes it penal for a trader to contract debts, without having at the time a reasonable expectation of paying them; that the Insolvent did this, with respect to every one of the Notes mentioned in the allegation, has been to my mind clearly proved, and I have, therefore, only to apportion the penalty, on being satisfied with the proof. Looking, however, to all the circumstances of this case, to the general character of the Insolvent, to the failure in proof of the charges of fraud, and, though last not least, to the information derived

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from the books of the Insolvent; I feel that a mild sentence will meet the justice of the case—a sentence which will not only be agreeable to my own feelings, but be also, I am persuaded, in accordance with the feelings of those creditors, whom a proper sense of what was due to themselves and to the members of the mercantile body, compelled to appear against the Insolvent in this Court.

The sentence on the Insolvent is, that he be imprisoned for six months, and that when he shall have undergone this imprisonment he shall be entitled to his certificate.

WILLIAMS v. DUESBURY.

In Error—23rd June, 1865.

(Sir R. B. CLARKE, C. J.)

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THIS case was brought under the following circumstances:—

Respondent, it appeared, had received authority from his father, *Robert Duesbury*, to take possession of and plant for the latter a spot of land situated somewhere in Speightstown; and by way of establishing that authority he proceeded to cut down and remove a tree growing on the said land. He was in consequence given in custody to Appellant by a person named *Bourne*, who laid claim to a portion of this land. Respondent summoned Appellant before the Police Magistrate for the Parish of Saint Peter, *Reynold F. B. Alleyne Esqr.*, for assault and battery, and illegal imprisonment—claiming damages not exceeding ten pounds. Appellant pleaded the general issue, and the Magistrate after hearing dismissed the complaint for want of jurisdiction, imposing no costs. From this decision an appeal was brought to the Assistant Court of Appeal by the Respondent (Appellant in that Court) in whose behalf Mr. *Reeves* appeared, and submitted the following as his reasons for appealing:—
“That the second section of the Act of the 12th August 1864, gives the Petty Debt Court jurisdiction in all pleas of personal actions, where the damages claimed are not above ten pounds, and that there was no question of ‘Title to any corporeal or incorporeal hereditaments’ between Appellant and Respondent, or any other question, which, under the proviso of the said second section, ousts the jurisdiction of the Court.”

The Court then proceeded to examine the evidence adduced, and at its conclusion delivered the following as their decision on the case:—

“This is a plaint under the Act of the 19th August, 1864, to amend the Law for the more easy and speedy recovery of small debts. The Respondent is a Serjeant of Police, and on the 19th of April last he took Appellant into custody whilst engaged in cutting down and removing a tree on land claimed by Appellant’s father and by one *John W. Bourne*, and carried Appellant to the Police Station at District E. and held Appellant in

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custody there for some half hour. And the plaintiff is to recover damages for false imprisonment. Respondent pleaded the general issue, and the Magistrate after hearing dismissed the complaint for want of jurisdiction; but has not stated on what ground. Now the Act (clause 2) gives to the Magistrate jurisdiction in all pleas of personal actions where the debt or damage claimed is not more than £10, with certain exceptions provided in the Act, namely in cases of ejectment or in which the title to any corporeal or incorporeal hereditaments or to any franchise shall be in question, or in which the validity of any devise, bequest, or limitation under any will or settlement may be disputed, or for any malicious prosecution, or for any libel or slander or for criminal conversation, or for seduction or breach of promise of marriage. But this plaintiff does not appear to us to come within the reach of any of these exceptions. There is, it seems, a question of disputed title to land between Appellant's father (for whom Appellant was acting) and *John W. Bourne*, but that is a matter that in no way affects this plaintiff or could be affected by it. It is a matter exclusively between Appellant's father and *Bourne*, with which Respondent clearly has no concern whatever; and we cannot see how it could bar the Magistrate's jurisdiction with regard to this plaintiff. Considering that the Magistrate had jurisdiction under the Act we proceed to a review of the case on the merits. It appears in evidence that on the 19th of *April* last Appellant took possession from his father, *Robert Duesbury*, of a piece of land situated near Denmark Fort, in the Parish of Saint Peter, and proceeded to cut down and remove a tree growing on the said land; that this was made known to Respondent by a police officer, *Rudder*, residing on the land, and that Respondent sent *Rudder* to tell *John W. Bourne*; that *Bourne* thereupon went to Respondent for counsel, as to how he should act, and Respondent advised him to go upon the land and forbid Appellant and his brother who was aiding him in removing the tree, and if they would not desist to return to him; that *Bourne* did return to Respondent and tell him the parties would not desist, and Respondent then told *Bourne*, using Respondent's own words as deposed in his examination, "if he would give them over to me I would take them into custody: but mind I did not advise him to do so." Respondent then accompanied *Bourne* to the land, and took Appellant and his brother in custody at *Bourne's* request, carried them to the Station where they were retained some half hour in custody, and then discharged them, also, at *Bourne's* request, no charge having been entered against them in the police sheet. Respondent says that Appellant was given over on a charge of stealing. But this was not borne out by other evidence, and even if such a charge had been preferred by *Bourne*, Respondent knew—his whole conduct throughout goes to show that he knew—that it was altogether unfounded. He knew that Appellant's father, *Robert Duesbury*, made some claim to the land from which Appellant and his brother were removing the tree. Only the day before, namely, on the 19th *April* Respondent had signed his name as witness to a paper before the Court which *Robert Duesbury* had given to Appellant authorizing him to take possession

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of the land and plant; and on the evidence before the Magistrate of *Oscar F. Bourne*, son of *John W. Bourne*, Respondent had told witness' father at the Station on the 19th, before going to take Appellant into custody, that he Respondent "did not wish police officer *Rudder* to mix himself up in a private quarrel," and the very caution with which Respondent attempted to relieve himself of the responsibility of advising *Bourne* to give over the Appellant whilst instigating him to the act would imply a consciousness that what the Appellant was engaged in doing did not properly come within the range of his authority as a police officer. Looking at the evidence before the Court as a whole, we are of opinion that the Respondent had no proper and sufficient authority for taking the Appellant into custody, that no sufficient justification has been made out for the act and that Appellant is entitled to damages. And our judgment is that Respondent do pay to Appellant the sum of £10 in four monthly instalments of £2. 10s. each, the first instalment to be paid on the 15th of this present month and the others on the 15th *July, August and September* next ensuing. No costs of appeal."

Against this decision Appellant (Respondent in the Court below) appealed and the litigants were represented by counsel, the Solicitor General appearing for the Appellant and Mr *Reeves* for the Respondent.

The question argued was one of jurisdiction.

The Court adjourned till Friday the 30th when his Honour delivered the following judgment:—

This case arose on a complaint before the Magistrate for the parish of St. Peter, in which the Respondent *John Duesbury* brought a plaint against *John J. Williams*, Serjeant of Police, the Appellant, for "assault and battery, illegal arrest and imprisonment" and claimed damages under the second clause of a recent Act, to amend the law "for the more easy and speedy recovery of small debts," which gives the Police Magistrates jurisdiction in all pleas of personal actions where the debt or damage claimed is not more than ten pounds, except among other matters, "in any action in which the title to any corporeal or incorporeal hereditaments shall be in question." Thus the first enquiry when any plaint is brought under this Act, necessarily is, whether it comes within any of the exceptions specified in the clause; and if the evidence shows that it does, it is the duty of the Magistrate at once to dismiss the case.

It will be observed that the words of the clause do not confine the question of "title" to one existing between the actual parties before the Magistrate, the Appellant and Respondent in the Court below; they are "in which the title to any corporeal hereditaments shall be in question;" they include all cases in which a question of title incidentally arises, and which must be enquired into, in order to dispose of the case.

It appears from the facts proved before the Magistrate that a spot of land, about half an acre on which the circumstances leading to the complaint took place, had been owned by one *Archer* since 1844; that he rented it in his lifetime to the police

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officer for the benefit of his children; and on his death-bed authorized his brother-in-law one *John Wm. Bourne*, to see after it for his children: that since his death the police officer has retained possession of it, and paid the rent to *Bourne*; one *Robert Duesbury* set up a claim to this land, and authorized his son, the Respondent *John Duesbury* to "take possession of it, and plant it for his benefit;" that on the 19th April *John Duesbury* and his brother went to this land, cut down a tree growing on it, and carried away a portion of it, *John William Bourne* not being there; that on their returning for the remainder, *John Wm. Bourne* was there, and Serjeant *Williams* also, he having been called on by *Bourne* to protect the property. *John Duesbury* admitted he considered that *Williams* had advised "and was acting on behalf of *Bourne*;" and that *Bourne* claimed the land. It seems that *Bourne* had consulted the Serjeant, who said that as the person in possession of the land was a police officer, he would not like him to mix himself up in a private quarrel; but as *Bourne* was the proprietor of the land, it would be better for him to act, and told him to go to the spot and advise the young men to desist from cutting down and carrying away trees, which *Bourne* did, but they did not desist; *Bourne* returned for the Serjeant who went to the land, and on seeing the two brothers about to carry off the portion of the tree which they had cut down, interfered by the request of *Bourne* and, to use the language of the Respondent *John Duesbury*, "I told the Magistrate that I was taken into custody with a piece of the tree which Serjeant *Williams* struggled with me for."

This is the substance of the evidence given before the Magistrate, and on which his decision was "dismissed for want of jurisdiction"—No costs. It is very laconic—and it certainly was his duty to have given his reason for it, according to the official instructions to that effect.

The evidence taken in the Court below does not differ from the above; but *Williams* was examined there and swore that he acted in the belief that the land had been *Archer's* for upwards of twenty years, and came into *Bourne's* possession at *Archer's* death; and considering that *Bourne* was the proper authority to give over the Respondent, *John Duesbury*, for cutting down and carrying away the trees on the land, and took him into custody at *Bourne's* request. In cross-examination, *Williams* admitted that he had no warrant—he knew that *Robert Duesbury* the father of *John* pretends to claim the land, and that he had witnessed the day before the occurrence, a paper writing signed by the father which was put in evidence, and is as follows:—"I do hereby authorize my son *John Richard Duesbury*, to take possession of and plant for my benefit, a spot of land containing half an acre more or less situated to the south of Denmark Fort in Speightstown." A document of importance; for it proves first, that *Robert Duesbury* was not in possession of this land; and secondly that he laid claim to it while in the possession of another—which claim was intended to be asserted by the Respondent by cutting down and carrying away the trees,

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the very fact in respect of which the arrest, which forms the subject of the plaint before the Magistrate, took place.

This is the evidence which relates to the primary question in the case, whether the magistrate had jurisdiction, or whether it was excluded from his cognizance by reason of there being a question of title to land, arising from the circumstances put in evidence. It was also necessarily the primary question before the Court of Appeal, since that Court has no jurisdiction in cases in which the Magistrates have none; and I shall confine myself to that question.

It is not my desire at any time to criticise very narrowly the terms of the decision of the Court below; it is however, necessary to refer to it with some particularity, and it was relied on and strongly pressed on my attention by the counsel for the party in whose favour it was made. In that decision the Court gives the following opinion—It does not seem to us that the case comes within the reach of any of the exceptions contained in the Act. There is, it seems, a question of disputed title to land belonging to *Duesbury's* father, for whom *John Duesbury* was acting, and one *John Wm. Bourne*; but that is a matter which in no way affects this plaint, or could be affected by it. It is a matter exclusively between *John Duesbury's* father and *Bourne*, with which *Williams* clearly had no concern whatever, and we cannot see how it could bar the Magistrate's jurisdiction with respect to this plaint." Now, with great respect for the Court, I cannot concur either in the accuracy of this statement or in the correctness of the conclusion drawn from it. In the first place the land is spoken of as "belonging to *Duesbury's* father" while the evidence shows that since 1844, it belonged to one *Archer*, who, on his death-bed authorized *Bourne* to see after it for his children: the police officer was in possession of it as *Archer's* tenant, and since his death has continued as tenant to *Bourne* paying him the rent, thus showing a continued possession of twenty years; while the claim set up by *Robert Duesbury* to whom they say the "land belonged," and under which *John Duesbury* acted and cut down the tree, was so far as the evidence furnished by himself gives, not two days old: and on the face of it proves that on the day before the tree was cut down the land was not in his possession for he authorized his son to "take possession of it." Next, it is the opinion of the Court that it was a matter "exclusively between *John Duesbury's* father and *Bourne*, with which *Williams* clearly had no concern whatever." Now, *John Duesbury*, the complainant before the Magistrate was acting on behalf of the father, and *Williams* the defendant, was called on as a police officer, and was acting on behalf and at the request of *Bourne*. But the question which the Magistrate and the Court were bound to enquire into was not between whom the question of title was disputed? but whether any question of disputed title to land did arise on the evidence; they admit that there was "a question of disputed title to land," the very land with respect to which one of the parties to the plaint was acting on behalf of a claimant: while the other party to it was acting as a police officer, as in duty bound to do, when called on, on behalf of the person in

whose possession the land was ; and in the face of these facts the Court did not think the case came within the reach of the exception relating to "title to land," while it is to my mind manifest, that the case arose solely because of a claim of title to land, and that every act of both parties to the plaint was done wholly because of this claim ; and in the decision itself, it is averred that *Williams* took *John Duesbury* "into custody while engaged in cutting down and removing a tree on land claimed by *John Duesbury's* father and one *John Wm. Bourne*."

It is scarcely necessary to say, that it is impossible to arrive at a just decision in any case without taking into consideration all the circumstances of that case ; you cannot bring an action against a man, and shut out from consideration the fact on which the action is founded ; nor can you make a selection from these facts, so as to deprive either of the parties of any defence or excuse, which the other circumstances would afford. I am of opinion, that it is impossible to come to a satisfactory conclusion in this case, without entertaining the enquiry, whether *Bourne* was right in retaining possession of this land, or *Duesbury* right in claiming that possession ; for surely it is a very different question, as affecting the police officer, whether he is engaged in protecting property for its rightful owner, or in preventing that owner from taking and enjoying his own ; and how is this to be decided, if you shut out from enquiry the question of right or title to that property. It is impossible to sever the Sergeant, in this case, from the circumstances under which he acted ; and if on the face of those circumstances, a question of disputed title to land arose, with respect to which he acted, as it manifestly did, then the Magistrate had no jurisdiction, and the Court of Appeal no right to adjudicate on the merits as it has done. In Davis' County Court Practice, the very point under discussion is illustrated by the case of cutting down a tree ; for it not unfrequently happens, he states, that questions of title arise in the course of trials of actions, within the jurisdiction of County Courts—(and the clause of the Act, under which the plaint before the Magistrate was made, is taken from the laws giving jurisdiction to County Courts). Thus an action may be brought for the value of a tree, which is alleged to be wrongfully cut down—the defence may be that it was growing on the defendant's land ; "the question of title then becomes a question incidentally arising in the cause, but which must be decided in order to dispose of the claim"; it is, however removed, as by our law here, from the jurisdiction of the County Courts, unless by consent of the parties. This will also be made manifest, by considering that an action for false imprisonment may be brought not only against the party who actually arrested the plaintiff, but also against the person who caused his arrest.

If such be the rule of law, and it will not be questioned, it is clear that the same facts must constitute the ground of action as well against the constable as against the person for whom he acted. It is admitted that the facts in this case raised the question of title between the possessor and the claimant to this land, and how is it possible to imagine that the facts which raise

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it in the one case do not raise it in the other? It is the right either of the possessor or the claimant which will decide the question between them; and is this not to be taken into consideration in the case of the police officer who is called on to act, who is bound to act and does act solely in reference to the same right or title. Such a conclusion seems to me equally unreasonable and unjust, and cannot be supported. I have only one more remark to make with reference to the decision of the Court below; it was characterised by the counsel for *Duesbury* as "exhaustive"; to a certain extent I am disposed to concur with this description of it, and to agree with him that so far as the measure of punishment which it was in the power of the Court to award, it is exhaustive—thus far I agree in the remark, but no further. It only remains for me to say that I think the question of title was sufficiently raised before the Magistrate to deprive him of jurisdiction in the case; and the additional evidence produced before the Court of Appeal, and especially the document signed by the father of *John Duesbury*, authorizing him to take possession of the land, tended most materially to confirm the correctness of the view of the case taken by the Magistrate. It is my duty therefore to reverse the decision of the Court of Appeal: they had no authority to decide on the merits of a case coming before them on appeal, which the Magistrate had no jurisdiction to entertain. The effect of this decision will be to sustain that of the Magistrate.

After some conversation between counsel for the litigants—

The Solicitor General observed that he was disposed to waive the condition of costs, provided the question was settled.

His Honor remarked that the proposition was a very just one. There was no doubt that the action had been brought against the wrong man. Nor had it appeared by the evidence before the Court that there had been the slightest harshness in his (the police officer's) conduct.

The question of costs was then left over for further consideration.

COLONEL JOHN ELLIOTT v. ROBT. S. FRASER.

(*In Error* 30th July 1884.)

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THE Petition in this case was heard before His Honour JAMES CLEMENT CHOPPIN, Acting Chief Judge, sitting as a Court of Error on this day.

On the case being called, Mr. W. H. GREAVES, appeared as Counsel for Respondent.

The Appellant appeared in person.

The Appellant addressed the Court in support of his Petition.

Mr. W. H. GREAVES then rose to address the Court, in reply, but, His Honour stated that he would not call on Mr. Greaves

to address the Court. After explaining to the Appellant the reasons why cases should be brought to this Court, and giving a résumé of the facts of the case, His Honour stated that the Judges of the Assistant Court of Appeal had the power of amending convictions sent up to them by the Magistrates.

This was clearly decided and the course for them to pursue was fully set out, in the decision of Sir Charles Packer in the case of *Skeete v. Sargeant et al* on 23rd August 1878. If the Judges of the Assistant Court of Appeal had failed to amend the conviction of the magistrate by not inserting the "insulting words" used by appellant they would have erred, but on the contrary they had amended the conviction and inserted those words, and consequently the conviction sent on to this Court by the Judges of the Assistant Court of Appeal was a valid conviction. He therefore dismissed the Appeal to this Court with costs.

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OVERTON v. CALLENDAR.

(In Error, 2nd October, 1885.)

His Honour Sir CHARLES PACKER, Knt. C. J.

Mr. H. Greaves for appellant.

Mr. Knight for respondent.

The facts of this case are stated in the judgment. His Honour in delivering judgment, states that this was an action for false imprisonment brought by the respondent against serjeant *Overton*, the head of the detective police. The Assistant Court of Appeal had found that *Overton* had falsely imprisoned *Callendar*, and awarded five pounds damage. Against that judgment *Overton* had appealed to the Court of Error. The facts of the case were briefly these. One *Egbert R. Callendar* had deserted from H. M. S. *Dido*; the captain of that ship had in accordance with The Naval Discipline Act issued a warrant for the arrest of *Egbert R. Callendar* which warrant had been entrusted to *Overton* for execution. *Overton* had handed the warrant to two police constables who on a certain evening sought out *William Thomas Callendar*, the respondent, and charged him with being a deserter from the *Dido* and threatened his arrest. *W. T. Callendar*, the respondent, who, as it happened had also been in service on the *Dido*, thereupon produced a discharge from such service. No arrest was consequently made but the respondent was requested to appear the next morning at the central police station and produce his discharge to *Overton*. This the respondent failed to do and consequently the two police constables went for him, but they did not take him into custody, as he went voluntarily, and no restraint was placed upon his liberty until he reached the central police station, and *Overton* said he must retain him and take him before the police magistrate. The

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respondent was in due course taken before the police magistrate and ordered to enter into recognizance for his appearance when the *Dido* returned. On the return of the *Dido*, the respondent was taken on board, and it was then found that he was not the deserted *Egbert R. Callendar*. The description in writing of the appearance &c. of *Egbert R. Callendar* given to *Overton* by the captain of the *Dido* answered in every particular to the description of the respondent. The writ issued for the arrest of *Egbert R. Callendar* directed that the deserter should be arrested and taken before the Captain of the *Dido*. Under these circumstances there can be no doubt that the respondent suffered false imprisonment at the hands of *Overton*. As to the question of damages, five pounds were awarded by the judges of the Assistant Court of Appeal. A case has been cited in which it appeared that the wrong person had been arrested, and the superintendent of police put on hand cuffs and in other respects ill treated the person wrongly arrested and detained. The jury in that case awarded only £5 damages. Now, in the case before the court it has not been shown that *Overton* harshly treated the respondent, on the contrary he gave him the use of his own quarters at the police station until he was taken before the police magistrate, and in other respects kindly treated him. On the whole *Overton* acted with great moderation and kindness to the respondent while he was detained at the police station. In a case in Error tried before me in 1876, I reduced the damages. I have caused a search to be made for precedents and found that Sir Boucher Clarke also reduced damages in a case in Error. I therefore reduce the damages from five pounds to one pound.

JOHN ABRAHAM GITTENS v. CHARLOTTE ALLEYNE.

(In Error 28th January 1887.)

His Honour Sir C. PACKER, Kt., C.J.

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THE Chief Judge in Error heard to-day two appeals from the Assistant Court of Appeal.

The first was *Gittens v. Pounder*, and the second was *Gittens v. Alleyne*. Both cases turned substantially upon the same point, and were argued as a consolidated appeal. The Solicitor General appeared for the appellant, *Gittens* in both cases, instructed by Mr. Lisle Fleming, Solicitor. The Respondent appeared in person.

He is a man of the labouring class, and said nothing. In the first case the appellant brought a complaint in the magistrate's court of St. Philip to eject the respondent from a piece of land which he held over after receiving notice from the appellant to quit. The magistrate ordered him to be ejected. He appealed, and the Court of Appeal reversed the magistrate's decision "without prejudice." In the second case *Alleyne* brought a plaint in the Petty Debt Court of the same parish for an illegal distress by the appellant in Error, *Gittens*. *Alleyne's*

case was, that although she had a wooden house on the land which *Pounder* held of *Gittens*, that at the time the distress was made there was no subsisting tenancy between *Gittens* and *Pounder*. The Judge of the Petty Debt Court Mr. *Watts* found for *Alleynes*, and awarded damages £5. *Gittens* appealed, and the Assistant Court of Appeal confirmed the decision.

The Solicitor General argued at great length against the decision of the court below, but conceded that if they were right in their decision in the case of *Gittens v. Pounder*, there then was nothing in the second case. The learned Judge reserved his judgment, which he delivered on Friday last, the 4th inst., confirming the decision of the Court of Appeal in both cases. The judgment was as follows:—

This is an appeal from the decision of the Assistant Court of Appeal under the following circumstances:—The Appellant in Error, *John Abraham Gittens*, took proceedings under Act No. 206, entitled “An Act to facilitate the recovery of possession of tenements after due determination of the tenancy,” before the police magistrate for the parish of Saint Philip to recover possession of a piece of land which he alleged had been held of him by the respondent in error, *Edward Pounder*, as an annual tenant, at a rental of \$7 per annum, which tenancy had been put an end to by due notice to quit. The magistrate thought the appellant was entitled to the possession of his land, and made an order that the defendant (present respondent), should be ejected from the tenement in question within a period of not less than five clear days and possession thereof be given to the appellant in error. From this order the present respondent appealed to the Assistant Court of Appeal, which court reversed the decision of the the magistrate and set aside his Order “without prejudice.” There is no doubt, having regard to the proceedings in this matter before the courts below, that the respondent was a tenant of the appellant, and both those courts have so found as a matter of fact. When the tenancy commenced is not very clear. The appellant deposed that the respondent became his tenant from the 1st July 1880; whilst the respondent says that he became the appellant’s tenant in 1878, so that for the purposes of this appeal it may be taken that there was a subsisting tenancy on and from the 1st July 1880. The facts being as I have stated them, the appellant in error on the 26th day of December 1885, served a notice upon the respondent in error to give up the land in question at the expiration of six months from that date. Respondent held over and on the 15th October 1886 appellant served a notice upon him, as required by the Act, in which he recited that the tenancy had been determined by due notice to quit on the 1st July 1886, and that as respondent held over, unless possession was given to him before the expiration of four days from the service of the then notice of 15th October 1886, he (appellant) would, on the 21st day of October apply to the magistrate to issue his warrant for ejecting respondent. This notice, though duly signed and dated in accordance with Form No. 1 in the Schedule given in the Act, did not have the addition of “owner” which is contained in the Form,

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The complaint, too, in Form No. 2 of the Schedule of the Act was not signed at all by the appellant; the date was blank, and it was not signed by the magistrate. When the case came on before the Court of Appeal that court held that the proceedings following the notice to quit of the 26th December 1885, were so defective, on account of the Forms No. 1 and 2 prescribed in the Act, essential points, as they thought, not having been followed, that the said proceedings could not stand, and that alone called upon them to reverse the decision of the magistrate, and set aside his order. But apart from this, the court held that the entire proceedings were irregular and bad, inasmuch as it was not true that the respondent was tenant to the appellant on the 26th December 1885. On which account, the notice, on the basis of which the magistrate adjudicated, was misleading. The Court of Appeal, it seems, took judicial notice of the fact furnished in part by their own records, that this same matter between the same parties had come up before them on a previous occasion, and they have appended to these proceedings all the necessary papers to enable this court to understand the connection between the present and former proceedings, and the ground on which the Assistant Court of Appeal went in not alone dismissing the appeal but in doing so "without prejudice." It would have been more regular on the part of the Assistant Court of Appeal if the proceedings in the former trials between the same parties respecting the same subject matter had been formally put in for the defence on subpoena to the police magistrate and the clerk of the Court of Appeal to produce those proceedings; and I should have had doubts whether I ought to recognize them at all but for the circumstances that the appellant in error himself, in his own evidence in the court below in support of his case, made statements which let in those former proceedings. The previous proceedings are admitted by counsel for the appellant to be correct for whatever they are worth. And I find by them that on the 28th December 1883, the appellant in error, being then the landlord of the respondent, served upon him a notice to quit and deliver up possession of the tenement in question on the 1st day of July 1884. By this notice the tenancy was determined on the 30th June 1884. Respondent after that date was a trespasser by holding over, and the appellant took proceedings before the magistrate to eject him. The magistrate finally adjudicated in the case on the 21st July 1884; and by his entry of the substance of his decision in the book kept for that purpose, in accordance with section 13 of the Justices of the Peace Procedure Act, he dismissed the complaint "without prejudice." In January of the following year, 1885, the appellant in error, without any new notice, as his complaint had been dismissed without prejudice, took proceedings again in the magistrate's court for the summary ejectment of the respondent. The magistrate, on the ground of informality in those proceedings, again dismissed the complaint without prejudice, as recorded in the book already referred to. There was an appeal by the present appellant to the Assistant Court of Appeal, and that court confirmed the decision of the magistrate. This de-

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cision seems to have been pronounced by the Court of Appeal on the 1st June 1885. In the proceedings before the magistrate, on this second case coming on for hearing on 23rd February 1885, the present appellant distinctly deposed,—“I served a notice on defendant in December, 1883, requiring him to give me peaceable possession of this land. Copy of this notice I produce.” It is manifest, therefore, unless a point, to be referred to later, made in this appeal by appellant’s counsel, be well founded, that, up to the 1st June 1885, when the second case between these parties on the same subject matter was decided in the Assistant Court of Appeal, the present Appellant was acting altogether on the strength of the notice given to Respondent under the date 28th December 1883; and, supposing it was a good notice, the tenancy was determined on the 30th June 1884. Unless, therefore, something occurred after that, legally binding on both parties, renewing or reconstituting the tenancy, the second notice of the 26th December 1885, was a nullity, and so were all proceedings founded upon it. And in consequence of which the magistrate would be wrong in making the order which he did on 21st October 1886, to eject the appellant, putting out of view for the present any mere informality apparent on the face of the proceedings. This is hardly denied by appellant’s counsel. But he contends that in the first case before the magistrate, decided on the 21st July 1884, although the magistrate did record in his book that the complaint was “dismissed without prejudice,” yet what he really decided was that the complaint was dismissed “on the merits,” on the ground that the notice of the 28th December 1883, was insufficient and bad. The Solicitor General relies on a note to this effect made by the magistrate from memory, as I find it stated, on the 15th November 1886, on the back of a duplicate of the Order-book in which his order on the hearing was recorded. Counsel contends that whether the magistrate was right in holding that the notice was bad is not the point; but that if he did decide that it was bad, since there was no appeal on that occasion, it was not competent in later proceedings between the same parties, or their privies, where the selfsame matter was in litigation, to raise a contention impeaching the ruling of the magistrate on the point. The matter, Counsel submits, was *res judicata*, and both parties were concluded by the decision of the magistrate. Supposing the fact were as the learned Counsel contended it to be, the principle of law is plain. Nothing can be clearer than that the judgment or decision of a court of competent jurisdiction, directly upon the point in question, is as a plea, a bar, or as evidence, is conclusive between the same parties upon the same matter directly brought in question subsequently and in any other court. But the point is whether the fact is as the learned Counsel contends it to be. The Justice of the Peace Procedure Act prescribes that in cases of summary jurisdiction the magistrate may either convict or dismiss the complaint “on the merits” or “without prejudice,” and shall thereupon enter or cause the same to be entered in the “order book.” The first case between these parties turning upon the first notice of 28th December 1883, was

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finally adjudicated on the 21st July 1884, and the magistrate thereupon entered his Judgment which was that the complaint was "dismissed without prejudice." These words have a definite legal meaning. They are prescribed by the Act, and it is a strong thing to contend that a record made by a magistrate at the time of deciding and in accordance with the law is impeachable on the authority of a note written on the back of it, two years afterwards and distinctly contradicting the record. But not alone have we the recorded decision made at the time, but proceedings were taken by the appellant in January 1885, manifestly in accordance with the right reserved to him to take proceedings anew because the former complaint had been dismissed "without prejudice." I hold therefore, that the notice of 28th December 1884, is a subsisting legal notice to quit, and, therefore, that the tenancy was determined on the 30th June 1884. It follows then, that for the notice of 26th December 1885, to be a good notice and for the proceedings on which the present appeal is founded to be good, it must be shown that there was a new tenancy after the 30th June 1884, which was subsisting on the 26th December 1885. The Solicitor General admits that a new tenancy could not be created at the option of one of the parties, but he says that the second notice was a waiver of the first; and he cites *Brierly v. Palmer* 16 East. 53, and other cases. But in all those cases it was the defendants who contended that the second notice waived the first. In *Brierly v. Palmer*, Lord Ellenborough said in effect that a notice to quit, whenever given, is an acknowledgment by the landlord at the time he gives it of a subsisting tenancy. Of course, if the party receiving it holds it to be so too, then there is that mutuality which is necessary to create a new tenancy. But it is beyond all question that a notice to quit can be waived and a new or continuing tenancy created only on the express or implied consent of both parties; and the question always is whether there is evidence to show such express or implied consent. In the present case there is nothing to show that the respondent was a consenting party to the waiving of the first notice and to the renewing of the tenancy after the 30th June 1884, except that he continued in possession after that date. And that merely holding over is not evidence of a renewed or continuing tenancy to bind a tenant receiving an absolute and unconditional notice to quit at a definite date, was the point decided in *Jenner v. Clegg*, 1 M. and R. 213, which case the Assistant Court of Appeal cited in giving their decision now under review. I am of opinion that the notice served upon the respondent in error on the 26th December 1883, put an end to the tenancy on the 30th June 1884. That that notice is good and subsisting, therefore, that the second notice of 26th December 1885, could operate upon no then subsisting tenancy and was a nullity. This goes to the foundation of the case before me in Error, and it is unnecessary to express any opinion upon the other points raised in the argument—whether the notice in accordance with Form 1, or the Complaint in accordance with Form 2 in the schedule of the Act, were good or not. It is competent for the appellant to fall back upon his first notice and

take proceedings to recover possession of his land, and I, therefore, confirm the decision of the court below.

With regard to the other case, that of *Alleyne v. Gittens*, the respondent in Error, *Charlotte Alleyne*, brought a complaint in the Petty Debt Court against the appellant *John Abraham Gittens* in trespass for entering by his bailiff on lands in the possession of the respondent in Error on the 12th July 1886, and distraining for rent alleged to be due. The land in question is that which is the subject-matter of the other case, and the Counsel for the appellant conceded in the course of his argument that if the decision of the Court of Appeal was correct in the case of *Gittens* and *Pounder*, then that he had no case in *Gittens* and *Alleyne*. The case of *Jenner v. Clegg*, on which the Assistant Court of Appeal went in deciding in *Gittens v. Alleyne*, and which upheld the previous judgment of the Petty Debt Court Judge, that there was no subsisting tenancy and therefore that the distress was illegal, is, in my opinion, a correct decision, and I therefore confirm the decision of the court below in that case also. The appellant in Error must pay the costs in both appeals.

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BERKELEY v. KNIGHT.

(In Error 8th July, 1887.)

His Honour W. C. REEVES, C. J.

Mr. GEEVES appeared for appellant and Mr. KNIGHT for Respondent.

His Honour delivered (on Friday 15th) the following judgment :

THIS is an appeal from a judgment of the Assistant Court of Appeal, appellate jurisdiction side, a majority of which court reversed the decision of Mr. Seon, senior police magistrate of Bridgetown, who, on hearing a complaint preferred by the present appellant against the respondent for selling a pint of wine, he not having a license as required by the Act of the 6th November 1876, convicted and ordered him to pay a fine of twenty pounds with costs of the complaint. After briefly stating the facts of the case, His Honour continued : The majority of the Judges of the Court of Appeal found it to be proved as a matter of fact that the article sold by respondent was "wine." Mr. Justice Reece saying in terms "that the evidence of Professor Harrison proves that St. Raphael Wine is liable to duty." But this learned Judge and Justice Alleyne being of opinion, as I collect from their respective judgments, that the evidence disclosed no fraudulent intention on the part of the respondent, which they thought necessary to justify a conviction under sec. 21 of the Act, they reversed the decision of the magistrate.

Justice Chandler dissented on the ground that the court was not at liberty to consider the intention of the respondent in selling the wine ; that the statute absolutely prohibited the sale of wine in such a small quantity without a license, and

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that the *mens rea* had nothing to with the question in view of the positive terms of the Act. The question for me is—whether the Court of Appeal is warranted in law in reversing the decision of the Magistrate. The Act of the 6th November 1876, sec. 3, in defining who are retailers within its meaning and intention declares amongst other things that every person who shall sell or barter wine in a less quantity than that usually contained in the packages known in commerce as a quarter cask or in imported cases of less than one dozen quart bottles shall be deemed a “retailer.” And sec. 21, on which the case before the court turns, is in the following terms:—

“If any person shall, without a license to be obtained under the provisions of this Act, dispose of any spirits, malt liquors or wines, or expose the same for sale, or shall have in his possession in any house or on or in any part whatever of any house or of any out buildings of any description thereto attached or appurtenant any spirits, malt liquors or wines with the intention to sell the same or any or either of them, or to keep or have them, or any of them in stock for sale, he shall be liable to a penalty equal to double the amount of the cost of a license, and also to forfeiture of any such liquids found in any of the places hereinbefore more particularly described, by any officer to be sold for the uses of the public; and in default of payment of such penalty to imprisonment for any term not less than three months nor exceeding twelve months.”

Now the rule for the interpretation of statutes as laid down by Lord *Wensleydale* in *Berke v. Smith*, 2 M & W 195, is “To adhere to the ordinary meaning of the words used and to the “grammatical construction, unless that be at variance with the intention of the Legislature, to be collected from the statute “itself, or leads to any manifest absurdity or repugnance, in “which case the language may be varied or modified so as to “avoid such inconvenience, but no further.” The intention of the Legislature in the present case, as gathered from the Act, is to prevent and prohibit the retailing of liquors, including wine, in small quantities, unless the person be licensed to do so. The learned Counsel for the respondent argues that the proceedings is a criminal one, and that there can be no crime unless there be the intention to commit crime; and in support of his contention, has cited a passage from *Maxwell* on the interpretation of statutes where that learned writer lays down the dictum thus:—“With few exceptions, a guilty mind is an “essential element in a breach of the criminal or penal law; and “unless a contrary intention is expressed or plainly to be inferred “from the statute, it would be construed as silently requiring that “this element should be imported into the definition of the offence.” That is no doubt sound doctrine; and, without stopping at this point to examine the cases which were cited by Mr. *Knight* in the course of his argument, I will observe that I see nothing in the passage from *Maxwell* to object to. It is no doubt a very sound and a very old doctrine that, in construing a criminal or penal statute, the construction must be strict; and if the language of the Act be such as to warrant the court in holding that the

intention to commit the offence is an essential ingredient, the court will so construe it. But Mr. *Maxwell* does not lay it down as a universal proposition that, in every criminal or penal offence, whatever the language of the Act constituting it, the intention must be made out. In the present case it is to be observed that the 21st sec. does not say that "if any person shall, without a license 'knowingly' or 'fraudulently' dispose of any spirits," &c. It says "If any person *shall* without being licensed to do "so dispose of any spirits, malt liquors or wines, &c. he shall be liable to a penalty equal to double the amount of the cost of "the license," &c. There is no room here for importing into the construction of the statute the question of intention. By the terms of the clause the simple disposal of the liquors mentioned, or any of them, without a license, constitutes the offence; the doing of the act is absolutely prohibited, and the offence is complete upon the doing of the prohibited act, albeit there be no intention to commit the offence. If the court is to be guided by the rule laid down by Lord *Wensleydale* and the words of sec. 21 are to be construed according to their plain meaning, it is evident, whether the present be called a criminal or a penal proceeding, from the terms employed, that the offence contemplated is one of those exceptions from the general rule of law in criminal or penal cases that it is essential to show that there was the intention to commit the offence. And the cases cited by the Solicitor General show that. Take first the *Queen v. Prince*. The prisoner was indicted for the misdemeanour of abducting a girl under the age of 16. The statute enacts—that "whosoever "shall unlawfully take, or cause to be taken any unmarried girl "under the age of 16, out of the possession.....of her father "or mother.....shall be guilty of a misdemeanour." Here was a distinctly criminal offence, and, ordinarily and at common law, it would of course have been an important element whether the offence was knowingly committed. But the words of the Act simply prohibited the doing of the thing. It was proved that the girl was only 14 years of age. The Jury, under the direction of the presiding Judge, found the prisoner guilty, but found as a matter of fact that before the man took her away, she had told him she was 18; that he *bona fide* believed such statement, and that such belief was reasonable. On a case reserved the matter was argued before sixteen Judges; and the court, Justice Brett alone dissenting, held that the conviction was right. Justice Blackburn, in the course of his judgment, remarked that no such word as "maliciously" or "knowingly" occurred in the statute; and the offence was complete if the girl was under 16 when she was unlawfully taken out of the possession of her lawful guardians. In the *Queen v. Bishop* the prisoner was convicted of receiving two lunatics into her house without being licensed. The Act under which the prisoner was indicted declared that "any person who *shall* receive two or "more lunatics into any house other than a house for the time "duly licensed, or an asylum or an hospital duly registered "under this Act shall be guilty of a misdemeanour;" and a "lunatic was defined to be every insane person and every

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"person being an idiot or lunatic or of unsound mind." The evidence in favour of the *bona fides* of the accused was strong, and the Jury who, under the ruling of the Judge, convicted the prisoner, found specially that though the persons so received were lunatics, the prisoner honestly and on reasonable grounds believed that they were not lunatics. A case was reserved and the court affirmed the conviction, holding that to constitute the offence created by the Act knowledge or absence of knowledge on the part of the person receiving lunatics as to their lunacy was immaterial. Here was another distinctly criminal offence, but, the wording of the Act being plain, it was held that the *mens rea* could not be considered. The ruling of the Judges in this case and that of the *Queen v. Prince* is most important as showing, as *Maxwell* points out in the passage quoted at the Bar, that though a guilty mind is, as a rule, an essential element in a criminal offence, it is far from being correct to say that that point enters into the construction of every criminal, not to say, penal, statute. Mr. *Herbert Broom*, at page 275 of his *Legal Maxims*, 3rd edition, discusses the Maxim, "*Actus non facit reum nisi mens sit rea*." The learned writer cites an observation which fell from Lord *Kenyon* in *Fowler v. Padget*, 7 T. R. 514, where that learned judge says: "It is a principle of natural justice and of our law that the intent and the act must both concur to constitute the offence." And Mr. *Broom* thereupon remarks that the first observation which suggests itself in limitation of this principle is that, whenever the law positively forbids a thing to be done it becomes thereupon, *ipso facto*, illegal to do it wilfully or, in some cases, even ignorantly. "For instance," he continues, "it has been held" (citing *Reg. v. Woodrow*, 15 M. & W. 404) "that a dealer in tobacco having in his possession adulterated tobacco although ignorant of the adulteration, is liable under the statute 5 & 6, Vic. c. 93, s. 3, to the penalties therein mentioned: and this decision merely affirms the principle established in previous cases and shows that penalties may be incurred under a prohibitory statute, without any intention on the part of the individual offending against the statute law, to infringe its provisions." Yet Mr. *Broom* upholds the fundamental doctrine of the common law, for he goes on to say that "in general, however, the intention of the party at the time of committing an act charged as an offence is as necessary to be proved, as any other fact laid in the indictment." I pass on to the case of *Cundy v. LeCocq*, also cited by the Solicitor General, which was not, like the cases of *Prince* and *Bishop*, an indictable offence and therefore distinctly criminal, but was a revenue case. The charge was for selling intoxicating liquor on licensed premises to a person who was drunk. The section declared that "if any licensed persons sells any intoxication liquor to any drunken person he shall be liable to a penalty." It was proved that the liquor was sold to a person who was drunk at the time, but it was also proved that neither the defendant nor his servants noticed at the time that the person was drunk, and that the drunken person, while on the premises, was quiet in his demeanour and had done

nothing to indicate insobriety. The magistrate convicted, and a case was stated for the opinion of the court. Justice Stephen on the appeal coming on in the Queen's Bench, said that in his opinion the words of the Act amounted to "an absolute prohibition of the sale, irrespective of the knowledge of the license holder," and that the conviction was right. *Matthew J.* concurred. The language, he said, appears plain and the case clearly is within the section. The argument (continued the learned Judge), put forward as to the *mens rea* is an argument that the word "knowingly" must be put into every offence in an Act of Parliament. It is clear beyond all controversy from these cases, continued the Chief Justice, that, whether the offence charged be essentially criminal as indictable offences or only penal, as where the crown seeks to recover penalties, as in Revenue cases, if the language of the Act unequivocally and absolutely prohibits the doing of a certain thing the offence is complete upon proof of the doing of it, without regard to knowledge or intention. Yet there is no doubt that the *mens rea* or guilty knowledge will be taken into consideration as being an essential element where a criminal or penal offence is charged, unless the words of the Act distinctly exclude such consideration. That is precisely what Mr. *Maxwell* lays down, and a case in point is that of *Somerset v. Hart*, 53, L.J.M.C. 77. This case was not cited at the Bar, but is of value in contrast with the case of *Cundy v. LeCocq*. The respondent *Hart*, who was an innkeeper, was charged under 35 and 36 Vict., c. 94, with "suffering" gaming to be carried on on his premises. The section under which the charge was brought declared, "that if any licensed person suffers any "gaming or unlawful game to be carried on on his premises,..... he shall be liable," &c.

It was proved that the gaming in question took place with the knowledge of the respondent's potman who took no steps to prevent it. The justices dismissed the information upon the ground that there was no evidence to show that the respondent himself knew that gaming was going on, or that he wilfully shut his eyes to what was taking place. On a case stated, the Queen's Bench dismissed the appeal and affirmed the decision of the justices. The question turned upon the word "suffers" which is the equivalent of the word permit. There was nothing to show that the accused suffered the gaming to go on, and therefore there was no offence. As I have already said, no such point arises in the case before the court unless I am at liberty to hold that the word "knowingly" is to be imported into the clause: and I know of no authority for doing so. Of the several cases cited by the counsel for the respondent there is only one that I think I am called upon to notice—that is the case of *Core v James*: the other cases do not in my opinion touch the points in the present case. In *Core v James* a complaint was lodged against the defendant *Core* for using a mixture to wit, alum in making bread for sale. The purchase of bread from defendant's shop was proved, and also that it contained alum. Defendant produced his baker, who swore that the bread was made by him from a sack of flour in defendant's shop; that he (the baker) put

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no alum in the flour, and that none could have got in without his knowledge. No other person worked on the premises but himself or had anything to do with the flour. Now the Act declared that "no baker.....should use any mixture or ingredient whatever in the making of such bread" other than the things mentioned; and alum was not one of those things. It is to be remarked that the Act does not say that whoever should sell or dispose of any bread containing any substance or material other than the substance or materials mentioned in the Act shall be liable to the penalty [prescribed, If the Act had said so, the case might have come within the principle of *R v Woodrow*, which Mr. Broom cites in his legal maxims, as I have already shown. The case might also have been within the principle of the cases cited by the Solicitor General. But having regard to the actual language of the Act under which the information was brought, the point in the case was whether the accused person or his servant "used" the alum. Now, there was nothing to show that either the one or the other had "used" it in making the bread, though certainly alum was found in the bread. When the case came before the Queen's Bench Division on appeal, the defendant having been convicted by the Justices, the conviction was quashed. *Lush J.* said, 'where neither the master nor the journeyman knows that the alum or the mixture is present, I think that the master cannot be considered to have used it so as to be liable under section 8. *Hannen J.* said, he was of the same opinion. "The proper meaning of section 8 is that the baker who uses the improper mixture or ingredient may be convicted if he knows that it is there." I think that the ruling of the Queen's Bench in this case is intelligible enough, and goes to show that in all cases of this nature which are criminal or quasi-criminal the provisions of the Act under which the complaint is brought should be strictly construed. The words of section 21 of "The Liquor License Act, 1876" under which the present complaint was lodged against the respondent is as absolutely prohibitory as the language of the respective Acts under which the indictments were framed in the cases of *Prince and Bishop*, or in that under which a penal information was lodged against *LeCocq* for a breach of the Revenue Laws. The words of the local Acts, as I have already pointed out, are "that if any person shall without a license.....dispose of any "spirits, malt liquors or wines.....he shall be liable to a penalty "&c." It seems to me that upon the words of this enactment the selling of the article by the respondent constituted the offence and made him liable *ipso facto* to the penalty prescribed. The cases cited on behalf of the appellant make it clear beyond all doubt that that is the only construction to be put upon the Act. And not alone have I those cases, but I also have the local case of *Seon v Clairmonte*, argued and decided in this Court in July 1873. In that case a complaint was lodged by one of the Revenue Officers against the persons constituting the mercantile firm I have mentioned for breach of the provisions of the Act No. 286 of 11th December 1855, and the Act No. 507 of the 30th December 1871,

in selling Angostura Bitters without being licensed. Sec. 6 of the last mentioned Act declared: "If any person shall without a license dispose of any spirituous liquors, wine or malt.....he shall for every such offence incur a penalty," &c. This clause, it will be seen, simply prohibits the sale of spirits, wines, &c., without a license, just as the 21st clause of the Act does under which the complaint was brought in the present case. It was admitted by the defendants in *Clairmonte's* case that the Angostura was spirits within the meaning of the Act, and the sale of the article by the defendants' clerks was also proved. But it was as distinctly proved that the article was sold by the clerk of the defendants out of bond without their knowledge, and that upon their learning that he had sold the article, they immediately cancelled the sale. The defendants were convicted on the charge in the magistrate's court. They appealed to the Assistant Court of Appeal, who confirmed the magistrate's decision, and there was an appeal to the court of Error. The facts were admitted by the Counsel for the appellants in this court. But their contention was, that the defendants were not affected by knowledge of the transaction, and that on a charge under a quasi-criminal enactment they were not liable for the act of their servant, not alone done without their knowledge or privy, but contrary to their wish, as was shewn by their having cancelled the sale on its coming to their knowledge. But the court held upon the principle laid down in the cases cited in this appeal by the Solicitor General, that the words of the statute under which the complaint was brought being simply prohibitory, the question of knowledge was not an element to be taken into account in the judgment. The Court held that the offence was complete the moment the sale took place; and it also held upon the authority of the *Attorney General v. Siddon*, 1 C. and J. 220 that the appellants were liable for the act of their clerk, performed in the ordinary course of his duty and for the benefit of his employers. I can very well understand, as Mr. Knight very ably argued, that the respondent in the present case, in selling the St. Raphael wine, had no intention to defraud the revenue. But guilty knowledge or the contrary, as has been abundantly shewn, has nothing to do with the question. Respondent is shewn to have had no license, yet a pint of wine was sold by him. The offence contemplated by the Act is complete, and he has incurred the penalty. This Court has no alternative but to reverse the decision of the Assistant Court of Appeal and confirm that of the police magistrate, with costs.

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BISHOP v. SMITH *et al.*

(In Error 8th July 1887.)

HIS Honour W. C. REEVES, C. J.
THE above case, which is of some importance on account of the bearing it has on the procedure of the Assistant Court of Appeal

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in its original jurisdiction, was heard on the 8th inst., and adjourned to the 15th, when His Honour the Chief Justice delivered judgment. The circumstances of the case are as follows:—Mrs. *Martha Eliza Bishop*, a married woman, carrying on business on her own account, brought an action in the Assistant Court of Appeal in its Original Jurisdiction to recover damages against Mr. *F. B. Smith*, the Provost Marshal, and Mr. *Robert H. Haynes*, Merchant, along with Mr. *John Burton*, his clerk, for trespass in taking away and disposing of her goods to their use. The levy was made by the provost marshal at Mr. *Haynes'* instance on a judgment confessed by the plaintiff's husband who had for some time been dealing with Mr. *Haynes*.

Mr. ARCHER, instructed by Mr. E. L. BARROW, Solicitor, appeared for the Appellant—the plaintiff in the court below.—The Respondents appeared in person.—The judgment is as follows:—

In this case, the appellant brought a plaint in the Assistant Court of Appeal, on the original jurisdiction side, to recover damages, which were laid at £50, against the respondents for unlawfully interfering with certain goods in the possession of and being the property of the appellant, and taking them away and disposing of them to the use of them (the respondents). The goods taken were enumerated on the face of the plaint, but neither the value of each item was set out nor the collective value of the whole. On the plaint coming on for hearing before the court on the 18th May last, one of the respondents submitted by way it would seem of oral or at any rate informal demurrer, that the appellant should be nonsuited on two grounds. 1. That the plaint was in trespass to realty and therefore two abbuttals at least should be set out; and further, that the appellant had included in one count both trespass to lands and goods. 2. That if even it was a plaint in trespass to goods the jurisdiction of the court being limited, in order to give it jurisdiction, the value of the goods should have been set out in accordance with Form 'G' page 40, of the Orders and Rules of the court. The first objection, as it is called, was overruled unanimously by the court; the majority upheld the second, and offered the appellant a nonsuit, which her Counsel refused, whereupon the majority of the court entered a verdict for respondents. The appellant appealed in presence of all the respondents in court which appeal is so noted on the record. A preliminary objection, overruled by the court, was taken that this appeal could not be entertained, because rule three of the orders and rules of the Assistant Court of Appeal in its original jurisdiction required that "the notice of the appeal shall be in writing." The rule does say so. But, in the first place, sec. 22, of the said Act only empowers the court to frame rules and orders for regulating the practice of their own court; and while the clause does not in terms give the rules and orders the force of law, the proviso at the end of the clause, says that the rules and orders made by the court shall not conflict with the provisions of the Act. Now, section 29 allowing an appeal to the Court of Error does not say that the appeal shall be in writing.

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On the other hand, sec. 31 says that any appeal under sec. 29 of this Act shall be made in the "forum and manner in which appeals are made to the Court of Error from decisions given by the Assistant Court of Appeal in its appellate jurisdiction—which of course is by parol as in an ordinary appeal from the decision or order of a police magistrate. It is true that this section (31) is repealed by the Court of Error Act of 7th February 1887, but the rules and orders referred to were made by the Judges on 16th August 1883, and allowed by the Chief Justice on 30th October, same year. The first remark I have to make in reference to the case in appeal is, that there are really no pleadings at all in proceedings in the Assistant Court of Appeal under the Act of 27th February, 1883. The Court exercises the same jurisdiction as the English County Courts. Section 8 and several other sections of the Petty Debt Act 22nd September 1869, based on the County Courts' Acts, are expressly incorporated in the Act which gives the Assistant Court of Appeal an original jurisdiction, for the purposes and within the limits defined in the Act. It is the policy of the County Courts Acts, as it is that of our Petty Debt Act, to enable suitors to get cheap and easy redress for wrongs, and to recover their debts by a cheap and speedy process. Hence, in going into court, suitors have only to state their cause of action in the briefest manner, without any particular technicality; only taking care to make the party sued, and the court which has to adjudicate, understand the nature of the injury sustained, the particulars of the debt or demand, and showing that there is jurisdiction in the court to try and determine the plaint. This being done, all that remains for the court is to go, in a summary way, into the merits of the case; hearing the evidence of the parties and their respective witnesses, and then deciding in accordance with the law bearing on the matter in dispute. In the case now before the court, the plaintiff, who is now the appellant, it must be admitted, framed her plaint with superfluous verbiage. But there is enough on the face of it to show that it is a plaint for trespass to the goods set out and whether it was strictly for trespass or to the goods simply, or for trespass and conversion was a point to be settled by the evidence at the hearing—if jurisdiction was shown on the face of the plaint. And I do not find that the court below or the opposite party objected to the plaint on the ground of its being misleading or embarrassing; but on the ground that, as the value of the goods was not given jurisdiction in the court was not shown. The court, under the circumstances, or rather a majority of them held that, inasmuch as the value of the goods was not set out, it might turn out in the course of the trial that the value was beyond their jurisdiction; and, moreover, they held that, in any event, when a plaint was brought for the conversion of goods the value must be set out, either on the face of the plaint or in the shape of particulars of demand, in accordance with Form "G" in the rules and orders of the court, framed under the authority of section 22 of the Act conferring original jurisdiction upon the court. I need not stop to discuss the point on the present occasion, whether, in a case of trespass to goods and

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conversion, if the evidence shows the value of the goods to be in excess of the amount to which the jurisdiction of the court is limited, though the damages claimed be within that limit, their jurisdiction would be ousted. But, the damages here claimed by plaintiff on the face of her plaint, which the court by the record before me regards as a plaint in trespass to goods and conversion, being laid at £50 and no more, jurisdiction was shown; and the Court should have gone on and ascertained by the evidence, and that only, what the respective parties had to say and then have determined. The 4th section of the Act of 27 February 1883 defining the jurisdiction of the court says:—"The Assistant Court of Appeal besides its present jurisdiction shall have original jurisdiction in all...pleas of personal actions where the damage claimed exceeds ten pounds, but does not exceed fifty pounds." The case of the *Apothecaries Company v. Burt* 5 Exch : 363, is in point. There the defendant was summoned into the County Court in a personal action, it being sought to recover damages against him of £20 (the extent of the jurisdiction of the court under 9 and 10 Vic : c. 95) for that, after the passing of the statute 55 Geo : 3. c. 194, on a day mentioned *and on divers other days* the defendant acted as an apothecary without a certificate at four places (named) within the jurisdiction of the Court. By this Act of Geo : the penalty recoverable for each offence was £20; and the jurisdiction of the court being limited to £20, a prohibition was applied for on the ground that, on the face of the plaint four offences might be proved at the hearing, the accumulated penalties for which would be £80. But the court of Exchequer refused the prohibition on the ground that whether the facts stated in the particulars showed that in point of law, several offences had been committed or one only, the sum sought to be recovered, notwithstanding the ambiguity in the statement of claim, expressly limited to £20, and that the case therefore fell within the jurisdiction of the County Court. As for the Form 'G' in the rules and orders of the Assistant Court of Appeal, it is to be observed that these are given only as "examples," and I do not think that the non-compliance with the Form 'G' by the appellant in the present case constituted such a defect of substance in the plaint as warranted the court in taking the course they did. It would seem to be optional with the parties to comply or not with Form 'G' for what is contained in the Form is matter of evidence. The essence of the plaint in the present case was the taking and seizing the goods of the appellant, carrying them away and disposing of them. There was enough on the face of the plaint to disclose a good and sufficient cause of action in trespass to goods; and the damages claimed being £50 only, the court clearly had jurisdiction. The rest was entirely matter of the evidence. I think the court was wrong in deciding that they had not jurisdiction; and even if they had not, the course for them was to strike the cause out, not to enter a verdict for defendants. Under the circumstances, I see no course for me to take but to reverse the decision of the court below and set aside their judgment in the case, which I now do. Costs of this appeal to be paid by the respondents.

PERCY HAYNES v. GEORGE DASH.

(In Error 16th Sept. 1887.)

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His Hon. W. C. REEVES :

To-day in the Court of Error, Mr. *Greaves* appeared to support an appeal from the decision of the Assistant Court of Appeal, brought by the abovenamed appellant.

The respondent was not represented by Counsel. The appellant, the manager of *Bissex Hill* plantation in St. Joseph's parish, lodged a complaint against the respondent before Mr. police magistrate *Armstrong*, under the Act of the 20th June 1878, for the prevention of trespasses of a "wanton, annoying, or malicious character." The alleged trespass was for going over a private road belonging to the plantation after having been forbidden to do so. Mr. *Armstrong* convicted, ordering respondent to pay a fine of 1/. and 9/ costs, and in default to be imprisoned seven days with hard labour. *Dash* appealed, and Messrs. *Alleyne* and *Reece* decided to reverse the decision of the Magistrate, which was consequently reversed. Mr. *Chandler* dissented. All the matters of fact and law involved in the case may be gathered from the separate reasons of each of the Judges of the Assistant Court of Appeal, and the judgment delivered on Friday last, in the Court of Error by the Chief Judge.

In the Assistant Court of Appeal 19 July 1887. The evidence in this and the court below discloses the following facts:

1. That defendant in the court below (appellant in this court) had with others, a right of user over a road of *Bissex Hill* plantation in the possession of complainant in the court below (respondent in this court) at a yearly rent of 10/ for the purpose of keeping the same in good order.

2. That on the 27th May 1887, appellant was in arrears of rent, from the 31st December 1886, in consequence of which he was forbidden to trespass on the said road.

3. That on the 31st May 1887, the amount of arrears (10/) were paid to respondent's agent, and a receipt given for a year's rent, but was refused by respondent who directed the money to be returned to appellant, who also refused to receive it back, and who on the 1st June 1887, committed the alleged trespass. Upon these facts the present proceedings were instituted under the Act of 20th June 1887.

To obtain a conviction under this Act (in the words of the Act) the trespass complained of must be proved to have been "wanton, annoying or malicious". It was contended that "if a person having been once forbidden, enters after the trespass is converted from what might have originally been of a civil nature or contract, into a criminal act, and comes within the scope of the provisions of the Act of the 20th June 1878."

Looking at the surrounding facts of this case, I am of opinion that there was a distinct mutuality of contract between the parties, which cannot be terminated in the arbitrary manner resorted to by respondent and that the provisions of a highly penal law ought not to be prostituted to suit his purpose. As

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to the question of expediency; as to costs &c., in a civil action I have nothing to do with that.

Upon these grounds I reverse the Magistrate's decision without prejudice to the case being brought on the civil side of the court. No costs.

FITZHERBERT ALLEYNE,

Snr. judge assistant court of appeal.

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The evidence in this case discloses—

1. That appellant and others residing at *Chalky Mount* have for years past been permitted to use a road belonging to *Bissex Hill* plantation and that in consideration of such permission appellant and others have (previous to the year 1886), contributed towards the maintenance and repair of the said road by providing labour.

2. That in 1886 appellant and others, in lieu of furnishing labour as aforesaid, contributed to the maintenance and repair of the road in question by the payment of a fixed sum of money.

3. That Mr. *Lewis*, the manager of *Bissex Hill* had authority from the respondent to receive such payments. That this authority has never been revoked by respondent.

4. That on the 28th October 1886, Appellant paid to Mr. *Lewis* the sum of \$1.20. The receipt annexed to these proceedings and marked 'A' runs thus: "Received October 28th 1886, from *Walter Dash* the sum of one dollar and twenty cents in full for passage of one horse and truck on private road belonging to *Bissex Hill* plantation to 31st December 1886." This receipt is signed *William Lewis pro A. P. Haynes*.

5. That this year, Appellant and others were called on to pay a larger sum of money for the use by them of the road in question, and that such larger sum was paid by the appellant on the 30th May last. The receipt annexed to these proceedings and marked 'B' runs thus: "Received May 30th 1887, from *George Walter Dash* the sum of two dollars and forty cents in full for passage on private road belonging to *Bissex Hill* plantation for the year 1887." This receipt is also signed *William Lewis pro A. P. Haynes*.

6. That on the 27th May this year, the respondent "sent a message to appellant's wife, requesting her to tell her husband that he forbade him or his dray again trespassing on the road." That appellant never denied having received this message.

7. There is nothing to show or even to suggest that any disagreement at any time existed between the appellant and respondent.

8. That on the 31st May the respondent ordered his agent in this matter (Mr. *Lewis*) to return to appellant the money paid by appellant on the 30th May as before mentioned. That this money was offered to appellant by Mr. *Lewis*. That appellant refused to take back this money, and that eventually the money was sent to the police station.

9. That Mr. *Haynes* denies having authorised Mr. *Lewis* to

make any contract with the *Chalky Mount* people, but admits having authorised Mr. *Lewis* to receive money from these people for the repairs of the road in question ; and further, that he (Mr. *Haynes*) had sent to appellant for his subscription towards such repairs.

10. That on the 1st June, respondent saw appellant driving over the road in question. Hence this complaint. At the hearing of this complaint, two points were discussed. (a) Whether this case rightly came within the provisions of the Petty Trespass Act, and (b) if so, was the complaint supported by the evidence. The Act of the 20th June 1878, provides a remedy for trespasses committed in a wanton, annoying or insulting manner. This Act, if it mean anything at all, is intended to afford redress against persons who, without any pretence of right, invade the rights of others in a malicious spirit.

In the present case we find that the appellant paid respondent's duly authorised agent a certain sum of money for the use of the road in question. There is no attempt on the part of respondent to prove that appellant did more than make use of this road in an ordinary and reasonable manner. Appellant contends that inasmuch as he has paid for the use of this road, he is fully justified in using the road until the expiration of the present year and that he has acted in the *bona fide* belief of a right. It is contended by respondent's counsel that the mere fact of appellant being forbidden to trespass is sufficient to bring the case within the provisions of the Criminal Trespass Act. This is not so. Forbidding a person to trespass is not *per se* sufficient to bring a trespass within the Act already mentioned. The circumstances surrounding the case must be such as to indicate a wanton, annoying, or insulting manner on the part of the person against whom the complaint is brought.

I am unable to discover any act on the part of the appellant such as to render him liable to a complaint of this nature. It is true that he paid his subscription after being forbidden to trespass ; but, looking to the fact that there had never been even a misunderstanding between appellant and respondent, it was not unreasonable to suppose (as appellant did suppose) that respondent sent to forbid appellant using the road because his (appellant's) subscription had not been paid.

For the above reason I am clearly of opinion that this case can not be entertained on the criminal side of the court, and that therefore the complaint be dismissed, the respondent paying costs of the court below (9/) in 14 days.

As in my opinion the first point demands a negative answer it is unnecessary for me to express any opinion on the second point.

I. RICHARD REECE.

From the proceedings forwarded by the magistrate and the additional evidence taken in this court, I gather the following to be the material facts of this case.

On May 27th 1887, the defendant's wife was driving his horse and dray along a private road in the possession of the

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complainant. Impelled by circumstances which had occurred, and which were mentioned in this court by the complainant as reasons for his action in the matter, the complainant forbade the defendant or his wife passing along this road again. Although it does not appear to have been written down by the clerk of this court, the defendant's wife in answer to me, stated that on reaching home she told the defendant the message received forbidding the use of the road.

On May 30th (Whit Monday), the complainant being absent from *Bissex Hill* for the day, the defendant, then well knowing that he (Mr. *Haynes*) had no desire to enter into a contract with him (the defendant) for the use of the road, but would refuse to do so, went to the book-keeper, who was ignorant of what had taken place on May 27th, and made a contract with him for the use of the road paying him 10/.

On being informed, on the morning of May 31st of the previous day's transaction, the complainant at once returned the 10/- to the defendant. The defendant, however, refused to accept it, as was stated in this court. The money was then sent to the clerk of the Petty Debt Court of the district and deposited with him until the defendant should call or sue for it.

The complainant then erected a barrier across the road, and on the following day, June 1st, the defendant went with his dray and removed the barrier.

The complaint is in the words of the Act, "for unlawfully entering after having been forbidden to do so."

The first question to be determined is, whether the defendant "unlawfully entered," that is, whether he committed a trespass *quare clausum fregit* by entering on June 1st, or had a right to enter under the contract made on May 30th.

Mr. *Haynes*, the complainant, and the book-keeper both state that the latter had no authority to make a contract for the use of the road; but, even supposing that the book-keeper had such authority, I do not think that it matters in the present case, for the contract entered into by the defendant on May 30th is vitiated by fraud, the defendant knowing at the time of making it that there was no mutuality on the part of the other party affected, Mr. *Haynes*. The defendant, therefore, 'unlawfully entered.'

It is clearly proved that 'he had been forbidden to do so;' in fact, no objection on this point was raised by the defendant.

I think, therefore, both the averments in the complaint proved, and that the magistrate's decision should be confirmed.

It was held by the majority of the court, that without deciding the first point at all (*i.e.* whether or not the defendant was entitled to enter under his contract), the court was justified in dismissing the complaint on the ground that the surrounding circumstances of the case did not show that the trespass was 'wanton' or 'malicious.' This was equivalent to saying that, assuming for the sake of argument, the defendant did "unlawfully enter," and admitting that "he had been forbidden to do so" yet, if the court did not think, on the whole, his conduct "wanton" or "malicious," then the complaint should be dismissed.

I disagree with the majority of the court on this ruling. The Act declares that proof of an entry 'after having been forbidden to do so' is sufficient evidence of 'wantonness' or 'malice' to warrant a conviction.

W. K. CHANDLER,

Judge of the Assistant Court of Appeal.

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IN THE COURT OF ERROR.

Friday, 23rd Sept. 1887.

Upon the case being called by the clerk of the court, His Honour delivered judgment, as follows:—

This is an appeal from the decision of the Assistant Court of Appeal under the following circumstances:—The present appellant, *J. P. Haynes*, the manager of and agent in charge of *Bissex Hill* plantation in Saint Joseph's parish, lodged a complaint with the police magistrate of that parish against the respondent, *George Dash*, under the Act of the 20th June, 1878, "for the prevention of petty trespasses to lands and premises." The charge was, "that the defendant did on the 1st of June (last) unlawfully enter on lands in possession of the complainant after having been forbidden to do so." The defendant pleaded "not guilty," and the magistrate, after hearing evidence, convicted, ordering him to pay a fine of 1/- with costs 9/-; and in default, to be imprisoned 7 days with hard labour. From this decision defendant appealed. On the hearing of the appeal, the majority of the Judges of the Assistant Court of Appeal held that the alleged trespass was not a petty trespass within the meaning and intention of the Act, which was passed to punish trespasses of a wanton, annoying or malicious character; and, therefore, the court reversed the decision of the magistrate. Upon which the complainant appealed to this court against the ruling by the Assistant Court of Appeal, on the point of law mentioned. The Act under which the complaint was brought was passed, as the preamble states, "to provide a summary and more effectual remedy for petty trespasses;" and not alone for "petty" trespasses, but petty trespasses of a wanton, annoying, or malicious character. And, in order to determine whether the ruling of the Assistant Court of Appeal is right or not, the evidence must be examined to ascertain whether the unlawful entry complained of was a "petty trespass," coming within the category of "wanton, annoying, or malicious." I find that the present appellant, in giving evidence before the magistrate in support of his complaint, stated that on the 27th of May last, seeing respondent's dray going over a private road of the estate, he sent the superintendent, a man named *Russell*, to the respondent's wife, who was upon the dray, requesting her to tell her husband that he (appellant) "forbade him or his dray" again passing over that road or any part of the estate. Appellant said further, that on the 1st of June he was standing at his window and saw respondent with his dray passing over the same road. Appellant had erected a barrier across the road, and, al-

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though he did not see respondent actually remove it, he must have done so in order to pass. *Samuel Russell*, appellant's superintendent, proved that he took the message to Mrs. *Dash* on the 27th of May; and that subsequently he met respondent on the public road and repeated to him the message he had previously given his wife for him. Witness also proved that a barrier was placed across the road on or immediately after the 27th of May. He then went on to state that, on the morning of the 1st June, he too saw respondent upon his dray going over the same road he had been forbidden to pass over. He did not see him remove the barrier, but he must have done so to pass. Nothing could be clearer than this evidence on the part of the appellant and the witness he called. Respondent did not contradict it. On the contrary, a witness called by himself confirmed the fact of his passing along the road on the 1st of June and removing the barrier. If the evidence had stopped there, it would doubtless have established a case of trespass on the part of the respondent, and also a trespass of a wanton and annoying character, because it would appear so far as the evidence I have cited goes, that the respondent had deliberately and without any lawful excuse whatever, driven his dray over and along a private road of the estate after having been forbidden to do so; and not alone that, but that he had insolently removed a barrier put across the road to prevent persons or vehicles passing; and, indeed, he produced his own servant to prove the removal of the barrier. Nothing, looking at the evidence so far, could present a case apparently more within the words and also the intent of the penal Act under which the complaint was brought. But the evidence does not by any means stop at the point I have indicated. There is another side to the picture. The appellant himself, in continuation of his evidence in the magisterial court, said "There has been a custom to permit persons residing in the Chalky Mount District who own conveyances, to pass over the road in question, provided that they contribute towards the repair, when called on. The road is stopped yearly, and I understand that has been done for many years, in order that it shall not be considered a public road." Asked by respondent, whether he had not paid money the previous year for the use of the road—appellant replied, "I cannot say." But he admitted to respondent that he had sent one *Beckles* to him. At the Court of Appeal, respondent followed up this last mentioned point, and appellant said, "I did send *Beckles* to you for money as a subscription to mend the road." The appellant added—"I never authorized Mr. *Lewis* to make any contract with the *Chalky Mount* people with respect to this road, but I said in my evidence that he was authorized to receive money for the purposes of mending the road." The superintendent *Russell*, already referred to, also gave the following evidence at the Court of Appeal—"I have lived 26 years at *Bissex Hill* and I know that the road has been stopped annually." *William Lewis*, book-keeper on the estate, the person alluded to above by appellant, called as a witness in the magisterial court in support of the complaint, among other things, said, "It is a custom to permit persons living in

Chalky Mount and having conveyances to pay yearly a certain amount to assist in keeping the road in repair. I was directed by complainant to see after collecting it but not to give receipts when the money was paid ; but it was to be entered in the books." The witness then added, that on Whit Monday, the 30th of May, respondent went to the estate and paid him 10/ for which he gave him a receipt. The witness said, in reply to a question from respondent, that in the previous year he had given him a receipt for his contribution towards the repair of the road. But he added that he had been forbidden afterwards to give receipts, and that respondent had "inveigled" him into giving the last receipt on 30th May this year. I may remark here that, for the purposes of the present case, nothing that I can see turns upon the fact of giving these receipts ; and they are only of value as showing that Mr. *Lewis* considered that he received the money in consideration of granting "a passage over a private road belonging to *Bissex Hill* plantation." So both receipts given to respondent run. I shall not take the trouble to refer to the evidence given on the part of the respondent, because this was a complaint to recover a fine on a penal proceeding, and it was no part of the duty of the magistrate or the Court of Appeal, in hearing a complaint under the Act in question, to investigate and determine whether or not Mr. *Lewis* was an agent of the appellant, authorized to grant a license to respondent to pass over the road, or, even if he was, whether the license was revoked. In other words, to enter into and determine the question, whether respondent had a legal right to go over the road. *Hawkins v. Bailey*, 4. T.R. 681, (note) *Blunt v. Grimes*, 4. T.R. 682 (note). The question was, whether in view of the entire evidence adduced by the appellant himself, showing that respondent pretended, with some reason it must be confessed, to have purchased the right to pass over the road in question for the year, it could be held that he was guilty of a petty trespass within the meaning of an Act passed to punish trespasses committed "wantonly," and, therefore, from the very terms employed, under circumstances in which there could be no colour or pretence of legal right. Now, upon the whole evidence, was there or was there not such a reasonable colour and pretence of right on the part of the respondent to go over the road of the plantation, as negatived that mere wantonness of trespass which is the mischief it is the policy of the enactment to suppress? Whether the alleged right is sufficient or well-founded in law, is not the question at present. The superintendent, *Russell*, says, the road has been open for 26 years, but is closed annually to save the right of the owners of the estate. The appellant says it has been "a custom" to permit the Chalky Mount people owning vehicles to pass over the road, provided they contribute to its repair when called upon to do so ; and respondent lives in Chalky Mount district and owns a vehicle. Of course, it is out of the question, upon the face of it, to talk about a "custom," the enjoyment of which depends upon the payment of a fee to obtain a license to exercise it. A right by custom must be as of right and not by leave asked for from time to time. If the enjoy-

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ment depends upon a license which may be granted or withheld then it is precarious, and there is no custom at all in the legal sense of the term. What the appellant means is, that a license is granted from time to time to use the road in question; and there is no doubt that a license may, under certain circumstances which I need not now go into, be revoked. In the present case, the appellant admits that he had called upon the respondent to contribute towards the repair of the road; and it would seem to be a fair inference which was drawn by the Court of Appeal, that it was because respondent did not pay when called upon to do so that he was forbidden, on the 27th of May, passing over the road again—the appellant immediately afterwards erecting a barrier across it. Well, as a matter of fact, the respondent paid on the 30th of the same month, his contribution to the book-keeper; and passed over the road on the 1st of June, the day of the alleged trespass, raising the barrier to enable him to do so. It is in evidence that on learning that the respondent had paid the money contribution to the book-keeper, appellant at once sent it back to respondent, who, on his part, refused to have anything to do with it. But that matter does not in any way affect the case in its present criminal or penal aspect, whatever might be its value as evidence in a civil court, where the right, by license or otherwise, to pass over the road was distinctly in issue. It is not denied—it is admitted that the book-keeper was invested by his master with a general authority to receive contributions towards the repair of the road; but appellant says he was not empowered to give receipts for the money paid, or to make a contract in his name with anybody for the use of the road in question. Now, there may be a parol license to use a way; but whether, in this case, there was express permission to respondent to use the way, or whether there are circumstances from which such permission may fairly be implied—whether, supposing the license arose out of the receipt by the respondent's book-keeper of the 10/ on the 30th of May—that license was, notwithstanding, revoked by the act of putting the barrier across the road, are all points of law that might very well be discussed and decided if the appellant, with the object of testing the right set up by respondent, had brought an action for trespass in a Civil Court. I express no opinion whatever upon the point—whether respondent had any legal right on the day in question to pass over the road. But I do say, looking at the evidence given by the appellant himself in the courts below, that there are grounds disclosed for a *bona fide* pretence of right on the part of the respondent to go over the road, though forbidden to do so; and that reasonable pretence of right, though it should be proved not well-founded in law, takes the case out of the meaning and intention of the statute under which the complaint was brought. The learned Counsel for the appellant cited the case of *Morden & Porter*, 29 L.J.M.C. 213, in support of this appeal. That was a case under the Game Laws. An information was laid against the respondent (*Porter*) who was defendant in the court below, to recover penalties for trespassing in pursuit of game. This land, the property of

Lady Pell, was in the occupation of one *John Everett*, who had given a person called *Bailey* leave to go on his land. *Bailey* seems to have invited the respondent upon the land in question. *Everett*, as I have said, was the person in occupation. The respondent sought to escape liability by pretending that he had also *Everett's* permission; and it was argued that, though *Everett* might not have been authorized to grant such permission, yet, if the respondent acted upon the *bona fide* belief that he had authority to grant such permission, respondent was not liable in a penal proceeding. *Williams J.*, who delivered the judgment of the court on the appeal, said—"The second question is whether there was, in point of law, evidence of such leave and license as would be, under section 30 of the statute 1 & 2 Will. 4. c. 32, a defence. I am of opinion that this question, as well as the third, viz., whether the *ex post facto* leave and license formed a condonation of the offence and related back to the time of the trespass, must be answered in the negative. I think there was no evidence in point of law of any such leave and license as would afford an answer to the information. The only evidence of any leave was, that *Everett* would have been given leave if he had been asked but that he had not been asked." And further on, the learned Judge remarked, *Everett* says, "that if the defendant had asked permission before this happened he would have given it to him," i.e. to the defendant. Not a word is said about ratifying any permission given by *Bailey*, even assuming that *Bailey* had given permission." In brief, the ground, whether well or ill-founded, on which the defendant's Counsel relied in the case cited for his contention, that his client committed the trespass in the *bona fide* belief that he had authority to go upon the land, was held by the court not to exist in fact—which is the difference between the case cited and that before this court. But it is to be remarked that in Justice *Williams'* judgment the following passage occurs:—"The dictum of *Earle J.*, in the case of the *Queen v. Cridland*, is relied on by the defendant's counsel but that case is wholly distinguishable, for it only decides that—where the entry is made under a *bona fide* claim of right, no proceedings can be maintained against the person so entering upon the land. But that is upon a principle (continues the learned Judge) not peculiar to this case, but applicable to all cases that no conviction can take place for an act done, under a *bona fide* claim of right to do it." I may observe that there are rights and rights. In the present case, the respondent does not pretend to any right or interests in the soil of the road on *Bissex Hill* plantation. What he claims is a right to pass over the road. The appellant himself and his book-keeper have shown that the respondent has grounds for setting up that claim of right, and, manifestly, there is no case under the Act providing for "wanton, annoying, and malicious" trespass. For these reasons, I think that the decision of the court below is right; and I affirm that decision, dismissing this appeal with costs.

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(In Error, 13th April, 1888.)

His Honour W. C. REEVES, C.J.

Mr. *Knight* (instructed by Mr. *Yearwood*) for appellant.

The *Solicitor General* (instructed by Mr. *Bynoe*) for respondent.

IN this case the appellant brought a plaint in the Assistant Court of Appeal, in the exercise of its original jurisdiction, against the respondent in detinue,—“for that the defendant did detain from the plaintiff a certain board and shingled house and out buildings the property of the plaintiff.....and the plaintiff claims the restoration of the said house and outbuildings or the sum of £50.” On the plaint coming on for hearing, Counsel for the respondent, defendant in the court below, moved that the cause be struck out on the ground that the plaint did not disclose jurisdiction:—that the jurisdiction of the court being limited and the plaintiff claiming the restoration of the property, the value of such property should be “stated.” The majority of the court (Justices *Alleyne* and *Reece*) upheld this preliminary objection, and the cause was struck out, Justice *Chandler* dissenting. Upon this, the appellant, plaintiff in the court below, gave notice of an appeal to this court. If the question I am called upon to decide was simply—whether the court below was right or wrong in holding that the plaint did not disclose jurisdiction, I should not have called upon the Counsel for the appellant until, at any rate, I had heard what the *Solicitor General* in behalf of the respondent had to say, because it seems to me that the point taken by him was substantially the same as that decided in this court in July last year in the case of *Bishop v. Smith*. In that case, the appellant brought a plaint in the court below against the respondent to recover £50 damages for taking away and disposing of, to his own use, certain goods, the property of the appellant. The goods taken were enumerated on the face of the plaint, but neither the value of each item was set out nor the collective value of the whole. The court below held that they had not jurisdiction because no value was set out, but, instead of striking out the cause as they have done in the present case, they came to a decision by entering a verdict for the respondent, defendant in the court below. The court having therefore given a decision within the words and meaning of section 2, subsection 2, of “The appeals from the Assistant Court of Appeal Act, 1886,” this court was enabled in the exercise of the power declared to be possessed by the Court of Error under section 9 of the Act, to reverse the decision of the court below, and set aside their judgment, thus enabling the appellant to bring her plaint afresh the other party having no right to plead or allege a subsisting judgment in his favour. In deciding that appeal I referred to the case of *The Apothecaries Company v. Burt*, 5 Exch. 353. There the defendant was summoned into the County Court in a personal action, it being sought to recover damages

against him of £20 (the extent of the jurisdiction of the court under 9 and 10 Vic. Ch. 95) for that, after the passing of Statute 55 Geo. 3 Ch. 194, on a day mentioned *and on divers other days*, the defendant acted as an Apothecary without a certificate at four places (named) within the jurisdiction of the court. By this Act of Geo. 3. the penalty recoverable for each offence was £20, and the jurisdiction of the court being limited to £20, a prohibition was applied for on the ground that, on the face of the plaint, four offences might be proved at the hearing; the accumulated penalties for which would be £80. But the Court of Exchequer refused the prohibition on the ground that whether the facts stated in the particulars showed that in point of law several offences had been committed, or one only the sum sought to be recovered, notwithstanding the ambiguity in the statement of the claim, was expressly limited to £20 and that the case therefore fell within the jurisdiction of the County Court. By parity of reasoning, even supposing that in the case now before the court the value of the goods claimed was more than £50, inasmuch as the plaintiff, in the court below, claimed no more than £50, the court as distinctly had jurisdiction to hear and determine the cause, as the English County Court had in the case of *The Apothecaries Company v. Burt*:—that is clear to demonstration. It is true that in *detinue* the judgment of the court is in the alternative, and the value of the goods must be proved. In the present case, if, on going into the evidence, it had turned out that the value of the goods exceeded £50, the jurisdiction of the court would have been ousted—in the same way as jurisdiction is ousted if a *bona fide* question of title arise during the hearing. *Taylor v. Addyman*, 22 L. J., C. P. 94 is in point. There the question was considered.—How is an excess of jurisdiction to be taken advantage of where in *detinue*, in a County Court, though jurisdiction be shown on the face of the plaint, the chattel turns out to be of greater value than the amount over which the court has jurisdiction. Counsel contended that the County Court had not jurisdiction in *detinue* at all, because he said that a plaintiff wishing to get possession of a chattel worth £1,000 might claim damages of £50 only, but at the same time claim a return of the chattel, and by that means empower the County Court Judge to decide on a matter of much greater value than £50. But *Maule J.* said, “I think this objection is answered by the consideration that if, in the course of the trial, it can be shown by the defendant that the goods are of more value than £50, the jurisdiction of the court would cease just as much as if title to really had come in question.” Section 8 of the Petty Debt Act 22 Sept. 1869, says “On the application of any person desirous to bring a suit under this Act, the clerk of the court shall enter in a book to be kept for this purpose in his office a plaint in writing, stating the names and the last known places of abode of the parties, and the substance of the action intended to be brought.” This section, amongst others, is incorporated in the Assistant Court of Appeal Act 1883; and I think that the provision is complied with by the plaint lodged in the Court of Appeal in this case. The substance

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of the action is—that the appellant sought to recover the property named in the plaint, or damages of £50. Mr. *Davis* says in his book on the practice of the County Courts that “the particulars must be a concise statement of the nature of the grievance or injury for which the plaintiff seeks compensation and the amount of damage sustained.” And Mr. *Herbert Broom* says in his book on the County Courts “the particulars of demand although not required to be in any precise form, ought to give a sufficient and reasonable amount of information to the defendant as to the nature of the claim made against him.” It is better of course I may add even in an action of detinue in the Superior Courts to set out the value of the goods, but not doing so does not make the action bad, any more than it makes the plaint bad in the County Court. To be sure, there is a Form of particulars in detinue (F) given at page 39 of “The Assistant Court of Appeal orders and rules 1883.” But these Forms are merely by way of example, and may or may not be followed—provided that the substance of the action is given, for as Mr. *Broom* remarks, “it is not requisite that the particulars be accurate in every respect, provided that the defendant could not be misled by them.” The plaint in the present case was good in substance—fully disclosing jurisdiction; and the rest was matter of evidence. If the court below had come to a decision which could have been reviewed by this court, I should have dealt with it as I did in the case of *Bishop v. Smith*. But “declining jurisdiction,” is not a decision by hearing and determining. The case falls within the principle of law on which the local case of *Regina v. Cook* was decided in the Court of Common Pleas in January, 1882. In that case, Mr. *Arthur* a merchant in town, filed in the Petty Debt Court of Saint Michael, of which Mr. *Cook* was then Judge, a plaint in debt against one *Reed*, residing in the parish of Saint Thomas—the cause of action having arisen in Saint Michael’s parish. On the day of hearing, plaintiff having appeared by his agent, the Judge, at the outset, declined jurisdiction and struck the cause out. It having been the opinion of Counsel that the Judge not having heard and determined the plaint, there was no decision to appeal from, application was made to the Court of Common Pleas for a Mandamus to Mr. *Cook* to hear and determine the plaint. Mr. *Cook* who showed cause in person contended, amongst other things, that, by declining jurisdiction, he had come to a decision and that Mr. *Arthur* might have appealed to the Assistant Court of Appeal and had the case heard there if that court was of opinion that there was jurisdiction. Counsel in support of the rule argued in reply that if Mr. *Cook* had decided anything the applicant could have gone to the Assistant Court of Appeal, but by striking the cause out he came to no judgment and made no order, so that there was nothing to appeal from. Sir *Charles Packer* in a considered judgment said that by the 53rd section of the Petty Debt Act of 1869, an appeal lay only where a decision or judgment had been given, and the dismissal of a case on the ground of want of jurisdiction was neither a judgment nor a decision. Sir *Charles Packer’s* judgment was clearly sup-

ported by local Act determining in what cases an appeal lies. I see nothing in the Act giving the Court of Appeal original jurisdiction or in the Court of Error Act of February 1887, which would empower me, sitting in Error, to treat the act of the court below in striking out the cause as a judgment order or determination within the meaning of those Acts. And, certainly, on principle it is not a judgment or decision with which a Court of Error ought to deal. In *Mullish v. Richardson*, which went to the House of Lords, and in which questions were submitted to the Judges *Tindal C. J.*, said, that "the proper object of Error is to remove the final judgment of the Court below for the revision of the Superior Court, in order that such court, from the premises contained in the record of the Inferior Court, may either affirm or reverse the judgment as they draw the same or a different conclusion from that pronounced by the Court below." I do not think it necessary to prolong this judgment by reviewing the several cases cited by the *Solicitor General*, who contended that this court had no power to entertain the appeal. They are cases strictly in point, and Sir *Charles Packer's* decision in *Regina v. Cook* is in accordance with the legal principles laid down in the cases cited, or on which those cases were decided. The learned Counsel for the appellant has not cited any case, and I am sure if there was a case he would have cited it; nor has he referred me to any local Act passed since Sir *Charles Packer's* decision, which would overrule that decision; and I must hold that in the case before the court no appeal lies, for the reasons I have stated. The appellant's remedy is to apply for rule of court, under the Act of May 1885, calling upon the Judges of the Court of Appeal to show cause why they should not hear and determine the plaint. So far as I am concerned, inasmuch as this court has no power to entertain the appeal, I dismiss the same; and under the circumstances, I shall make no order as to costs.

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JOHN C. LEACOCK v. JAMES W. MOE.

(In Error 13th July, 1888.)

His Honour W. C. REEVES, C.J.

THIS appeal arose out of a plaint lodged in the Petty Debt Court of Bridgetown by one *Jas. Walter Moe*, a mason, against *John C. Leacock*, for false imprisonment for which he claimed damages of £10.

Mr. *Archer* appeared for appellant, and put in the following preliminary objections:—

1. That the plaint is bad for want of certainty—the date of the committal of the alleged tortious act not being set forth, nor the circumstances set out with such certainty as would enable the defendant to plead a judgment of this court in his defence to the same action if brought in any other court.

2. That it prejudices the defendant's being prepared to

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prove an *alibi*, or his setting up any Statute of Limitation as a preliminary defence to this action.

The court overruled the objection, and in the result ordered *Leacock* to pay damages of £10 and costs 13/. From this decision *Leacock* appealed, but it was confirmed by the Assistant Court of Appeal, as will be seen by the following judgment:—

“In this case the court failed to discover the point in the preliminary objections taken by Counsel for the appellant. There are no pleadings in the Petty Debt Courts. All that is necessary is that the plaintiff should deliver to the clerk such a statement of the particulars of his cause of action as will enable the defendant to know what he is called upon to defend and what witnesses (if any) he should take to the court in his defence. If on the day of hearing a defendant can, on the case being called, satisfy the Judge that in consequence of the particulars annexed to his summons not being explicit enough, he *bona fide* does not know what he is charged with, and, consequently, has not come prepared with his defence, the Judge will adjourn the hearing of the action and order the plaintiff to furnish “further particulars.” In this case the plaintiff has framed his particulars from *Bullen and Leak*, 2 edition, page 335, and his particulars therefore contain all those elements which are deemed sufficient in the Court of Common Pleas, where the strictest attention to pleading must be observed. If appellant’s Counsel on the day of hearing in the Petty Debt Court had, at the opening of his case, called the Judge’s attention to the fact that no particular date was set forth as the date on which defendant gave appellant in custody for an alleged felony, and had satisfied the Judge that his client, in consequence, did not know what he was called upon to defend, and had in consequence been prejudiced in his defence, a motion for “further particulars” from him must have met with success. But appellant’s Counsel made no attempt to prove that he had been misled by this particular, and made no motion for further particulars. He merely put in paper marked ‘A’ and seemed to expect from that action, that judgment should be entered for defendants without a hearing of the facts of the case.

In this court counsel followed the same course. On the case being called, and before reading of the evidence, counsel addressed the court on the paper marked ‘A,’ but declined to conclude his address with any motion, either that judgment be entered for defendants, that judgment of nonsuit be entered, that the cause be struck out, or by any other motion. This court proceeded to read over the evidence and hear the case on the merits. Counsel for appellant declining to cross-examine any witnesses of the plaintiff, to produce any witness for defendant, or to address the court on the merits, as likely to prejudice his objections set forth in paper ‘A’.

The case came before the Court of Error on Friday, 13th July, Mr. *Archer* appeared for *Leacock* and the *Solicitor General* for *Moe*.

In addition to the objections urged in the lower courts, Mr. *Archer* put forward the following:—

"That Rule 20 of the Rules and Orders of the Petty Debt Court had not been complied with." And the learned counsel contended that the Judge was bound to decide the point of law raised as to this Rule, as he was not confined in his appeal to the Court of Error to objections raised in the lower court, it being an appeal from a decision of the lower court.

After hearing the *Solicitor General*,—

The CHIEF JUSTICE said that, having listened to the arguments of Counsel, the case did not, in his opinion, involve anything which made it necessary that he should take time to put his judgment in writing. It was, of course, desirable where a case was in any way complex, as involving points of law concerning which something might be said on both sides, that the court should put its judgment in writing for future reference. There was nothing complex about the present case. The respondent in Error lodged a plaint in the Bridgetown Petty Debt Court against the appellant in trespass for false imprisonment. It was only necessary, in the Petty Debt Court, to state the cause of action in the briefest possible way. It was sufficient if the plaint disclosed enough to show a legal wrong for which damages were recoverable. The Act stated in section eight that "on the application of any person desirous to bring a suit under this Act, the Clerk of the court shall enter in a book, to be kept for this purpose in his office, a plaint in writing stating the names and the last known place of abode of the parties, and the substance of the action intended to be brought." The rules of the Petty Debt Court, which had the force of law, required that "on entering a plaint particulars of demand shall be filed along with the plaint." In the present case particulars of the demand were not filed, and no date was given as to the time when the alleged wrong was committed. At the hearing, appellant's Counsel had a perfect right to call attention to the fact that no particulars had been filed, and he could have moved the Judge to adjourn the hearing until particulars were furnished. And if Counsel had done that, and the Judge had refused, he (His Honour) should have had no hesitation in ordering a new trial. Particulars were intended to control the generality of the declaration, and in the Superior Courts it was every day practice, where a defendant wanted particulars, to summon the plaintiff into Chambers and ask the Judge for an order upon him for particulars. The same thing by analogy might be done at the hearing of a plaint in the Petty Debt Court. But in the case now before the court defendant's Counsel did not make a substantive motion for particulars, but he put in an objection in writing to the plaint as being bad upon its face. The objection was, in effect, a demurrer to the plaint. Now, first of all, there were no pleadings at all in the Petty Debt Court. Section 18 says, that when the parties appear "and answer is to be made in Court, and the Judge shall proceed in a summary way to try the case and give judgment without further pleading or formal joinder of issue." But if even there were pleadings, in his opinion the plaint in this case was not bad upon its face because it did disclose all the essentials of an action in false im-

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prisonment. Therefore, a demurrer being put in, the court below had no course but to overrule it. The defect was that there were no particulars, as Rule 20 required, and, instead of insisting upon being furnished with particulars before the case was entered upon, counsel seemed to have elected to stand or fall by his demurrer. Mr. *Archer* had argued to-day that upon his objection, which he (His Honour) called a demurrer being overruled, that he did raise the point that defendant was embarrassed for want of particulars of date and otherwise; and he contended that there was at any rate, error upon the face of the proceeding because Rule 20 was not complied with. This court could not go outside of the four corners of the record. If the learned counsel did move for an order for particulars, it was not noted on the face of proceedings. If it had been noted, and the judge had refused to require the plaintiff to furnish them, he (His Honour) should certainly have set aside the judgment of the court below and ordered a new trial, because the defendant, in a case like this, where no date was mentioned on the face of the plaint, was the best judge of whether or not he was embarrassed in his defence by want of particulars. He could not say that a plaint brought in the Petty Debt Court was bad for not having the date mentioned. Dates were not given in the forms in use in the Superior Courts, and there had been no ruling on the point, so far as he knew, with reference to the County Courts. But there could be no doubt that the constant practice in the County Courts was to give the date of the commission of the wrong, in the particulars at any rate. The case of *Austin v. Dowling*, 5 C. P., L. R., 534, cited by Mr. *Archer*, and also another case now lying before the court (*Howard v. Remer*, 23 L.J., Q.B. 60) went to show certainly that in practice the date was given in the "particulars of demand." But he repeated that the absence of the particulars did not make the plaint bad if it disclosed cause of action as the present plaint did. Want of particulars was ground for calling upon the court to require the plaintiff to furnish particulars; and the Judge ought to make the order upon such terms as seemed fit in his discretion. As he had already said, there was nothing on the proceedings to show that the Judge of the Petty Debt Court had refused to require plaintiff to furnish particulars, or that that point had been raised in the Court of Appeal. In fact, there was nothing to show that the counsel for defendant had, in terms, raised that point at all. And if this court were to set aside the decision of the court below upon the ground that no particulars were furnished by plaintiff, the court would be deciding upon a point on which the decisions in the courts below did not turn at all. For all that appeared on the face of the proceedings to the contrary, the Judge of the Petty Debt Court would have sustained the contention of counsel for defendant had he moved, in terms, that the plaintiff should furnish particulars of his complaint before the case was entered upon. As it was, the proceedings came before this court showing that defendant's counsel had demurred to the plaint. Now, this court could not commit itself to the opinion that it was permissible to raise objections in the Petty

Debt Courts in the form of demurrers or special pleas. If a plaint or the particulars did not disclose a wrong for which a plaint would lie, of course, the plaint would be bad upon its face. But in the present case the plaint was not bad upon its face, and as defendant's counsel simply demurred to it, he saw no course open to him but to confirm the decision of the courts below—that decision being an overruling of the demurrer. This court had nothing to do with the merits of the case, and therefore he expressed no opinion at all upon that point. Appellant must pay the costs of the appeal.

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MOSES BRATHWATE v. NATHANIEL WEEKES.

(In Error 7th February, 1890).

His Honour Sir CONRAD REEVES, Kt., Chief Justice.

This was an appeal from a decision of the Assistant Court of appeal in its appellate jurisdiction. The appellant in the Court of Error was also the appellant in the Assistant Court of Appeal from a decision of Mr. Police Magistrate *Watts*, of District 'C.' The police magistrate had convicted the appellant on a charge of larceny, and a majority of the Assistant Court of appeal, viz., justice *Briggs* and acting justice *Evans*, had confirmed that conviction, justice *Knight* had dissented holding that the appellant had been illegally convicted. The Court of Error as will be seen, quashed the conviction of both the inferior courts.

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The facts of the case are briefly these: On 2nd November 1889, one *Lizzie Green* and her daughter, *Christian* were employed to cut sour grass growing on lands of *Mangrove* plantation, the property of the complainant. Both of them took some of the grass which they had cut into a field of canes belonging to the defendant. The defendant took no part in the removal of the grass but was standing in the boundary line between *Mangrove* plantation, and *Cane Garden* plantation (of which last mentioned plantation the defendant was the superintendent), a distance of about ten rods from the place where the grass was taken. The defendant saw the two women take the grass into his field of canes and did not prevent the felony, nor did he object to the grass being taken into his canes.

Mr. *Goodman* appeared for appellant and Mr. *Greaves* Q.C. Solicitor General appeared for respondent. Mr. *Goodman* addressed the court on behalf of the appellant, and prayed the court to reverse the respective decisions of Mr. police magistrate *Watts*, and of the Assistant Court of Appeal on the following grounds. (1) that the appellant had been convicted of larceny where there was no evidence of larceny against him on the face of the proceedings; (2) that appellant was convicted under Act No. 523 for stealing sour grass which came under the head of growing crops, whereas he ought to have been convicted, if convicted at all, under Act No. 441; (3) that the complaint was bad as it

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charged the appellant with stealing and also receiving. The *Solicitor General* replied and addressed the court on behalf of the respondent. He cited, *inter alia*, from memory, a case in which Sir Charles Packer, the late chief justice had decided that a person could be charged with stealing and receiving in the same complaint, and contended that the complaint in the case now before the court was not bad.

Mr. Goodman having made a rejoinder to the *Solicitor General*; His Honour said that he agreed with the appellant's Counsel on all the three points which he had raised. Firstly, there was no evidence on the face of the proceedings to convict appellant of larceny. The fact of his being on his land while grass-cutters took bundles of grass belonging to *Mangrove* estate and carried them into his canes in his sight and presence, did not *per se* constitute him a *particeps criminis*. Furthermore it appeared that he was eight rods away from these grass-cutters and that he said nothing and did nothing in the matter. It was old law that because a man was present when a felony was committed did not of itself make him an accomplice.

He must not only be present, but must be a participator in the commission of the offence. Secondly the appellant ought to have been charged under Act No. 441, which referred to growing crops, not under Act No. 523, which dealt with the larceny of goods and chattels. Thirdly, if the appellant was charged in the complaint, as he was with stealing and receiving, it was the duty of the inferior court to call upon the respondent to elect upon which of the charges he would go. His Honour therefore reversed the decisions of the courts below, and quashed the proceedings, the respondent to pay the costs (if any).

WILLIAM BRATHWAITE v. GARNETT TAYLOR.

(In Error 9th May 1890.)

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TAYLOR.

His Honour Sir CONRAD REEVES, Kt. Chief Justice.

THIS was an appeal from a decision of the Assistant Court of Appeal in its appellate jurisdiction. The appellant in the Court of Error was also the appellant in the Assistant Court of Appeal from a decision of Mr. police magistrate *Massiah* of Bridgetown. The police magistrate had convicted the appellant and ordered him to pay a fine of £5 and costs (8), to be recovered as in the case of servants' wages, on a charge of having, on the 20th November, 1889, exposed butchers' meat for sale within one mile from the limits of Bridgetown; and the majority of the Assistant Court of Appeal, viz. Justices *Chandler* and *Briggs*, had confirmed that conviction. Justice *Knight* had dissented, holding that the facts proved before the Court did not constitute an "exposure for sale" within the meaning of the Act under which the complaint was brought. The Court of Error, as will be seen, quashed the conviction of both the inferior courts.

The facts of the case are briefly these:—The appellant, who

resides in the parish of Christ Church, is a butcher, and obtains his living by killing and selling butchers' meat. On the day in question he was passing along Dalkeith Road in the parish of St. Michael, and turned into *Nurse's* shop and placed on the counter a basket with the contents covered with a cloth. On entering the shop he called for a bottle of ginger beer, for which he paid, and which he drank. He neither said nor did anything to indicate to any one present that he had mutton in his basket. Detective Corpl. *Wiles* happened to be in the shop, and knowing the occupation of the appellant, (having previously convicted him of exposing meat for sale within the prescribed limits of Bridgetown), and seeing through the interstices of the basket that it contained butchers' meat, he uncovered the basket and found therein half of a small sheep, (the two quarters being together and not dissected, as would have been the case if ordered and ready for delivery), and found also a large butchers' knife. Corpl. *Wiles* deposed to the fact, which was not corroborated by the other witnesses, that on uncovering the basket appellant told him that he was going to deliver the meat in Collymore Rock Road for a christening. Appellant then covered the meat again, and refusing to allow *Nurse*, the shopkeeper, to see the contents of the basket, left the shop. Dalkeith and Collymore Rock Roads are both within one mile of the limits of Bridgetown.

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The case was brought on for argument before His Honour on the 2nd May, when Mr. *G. A. Goodman*, Barrister-at-Law, who appeared on behalf of appellant, addressed the court, praying that the conviction of the inferior courts may be quashed. He conceded that the appellant was a butcher, and that the butchers' meat in question was not obtained from an animal which had been slaughtered in the slaughter house of the public market, or at a place duly licensed for the slaughter of butchers' meat under "The Slaughtering of Animals Act," but contended that the facts proved before the Assistant Court of Appeal and the police magistrate did not constitute an exposure of meat for sale within the meaning of the Act.

Mr. Solicitor General *Greaves*, Q.C., who appeared for the respondent, supported the conviction on the ground that under the Act, exposure for sale meant exposure with the intention to sell; that there was sufficient evidence proved from which the court was warranted in drawing the deduction that there was an intention on the part of the appellant to sell and that the fact of the meat having been exposed to the view of the detective through the interstices of the basket, was sufficient in the eye of the law to enable the court to come to the conclusion that there was a legal exposure of, within the meaning of the Act.

Mr. *Goodman* having replied,

His Honour said that he would not deliver judgment then as he preferred to put his reasons in writing. The Court was therefore adjourned to Friday, 9th inst., when His Honour delivered judgment as follows:—

This case comes before the court in appeal from the decision of the Assistant Court of Appeal, which court, by a majority of

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the Judges, confirmed a decision of the junior police magistrate of Bridgetown, who had convicted the appellant on a complaint lodged against him by the respondent, who is the Inspector of butchers' meat, for breach of the provision of the Act of 25th April, 1888, relating to the slaughtering of animals for butchers' meat; and the appellant was fined £5 and costs, to be recovered as in the case of servants' wages. The complaint charged that the defendant did at Dalkeith Road, Saint Michael, expose butchers' meat for sale within one mile from the limits of Bridgetown, &c. This complaint was brought under section four of the Act, which says—"Within the city of Bridgetown, and "within one mile from the limits thereof, no person shall expose "for sale, and no person who exercises the calling of selling butchers' meat, shall sell butchers' meat obtained from any animal slaughtered at any place other than in the slaughter house "of the Public Market, or in a place licensed for the slaughtering of animals as hereinafter provided." Three witnesses were produced before the magistrate and before the Court of Appeal in support of the complaint; two of these being police constables, and the third a shopkeeper named Nurse. Their evidence amounted to this—"That on the day of the alleged offence, Corporal Wiles was in the liquor shop of the witness Nurse, in Dalkeith Road, Saint Michael, which shop is within one mile of the limits of the city of Bridgetown. The appellant entered the shop and put upon the counter what appears to have been a wicker basket. It seems, as was proved in the Court of Appeal by the same witnesses, that on his entering the shop he asked for a bottle of ginger beer for which he paid, and which he drank at the moment. The basket, as Wiles deposed, was at the time covered with a cloth. But the constable, seeing through the open wicker work of the basket that "it contained butchers' meat," removed the cloth, and thus had exposed to his view certain undissected mutton and a butcher's knife. The other police constable was called to witness the contents of the basket. The shopkeeper was then called, and, as he deposed, asked the appellant to let him see the contents of the basket; but he refused and left the shop, taking the basket with him. There is some other matter upon the face of the proceedings as they come up to this court which I may have occasion to notice presently, but I have given all the legal evidence that is to be found in the proceedings, and which bears upon the issue that the courts below had to determine. The Act, I may remark, prohibits the sale of butchers' meat within one mile from the city limits, where the animal is not slaughtered at the public market house, or at a place licensed for slaughtering; and the case was much simplified by the appellant admitting in the court below that the mutton in question was slaughtered in Christ Church, and that he himself was a person using the calling of an ordinary butcher; nor was it denied that the shop in Dalkeith Road was within the prohibited limits. The question, therefore, which had to be determined in the court below was sharply this—whether or not the appellant did "expose butchers' meat for sale" within the meaning of the fourth section of the Act. The

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magistrate who tried the case and the Court of Appeal also held that the complaint was sustained. And both courts seemed to have attached great weight, firstly, to the fact, briefly recorded by the magistrate by way of memorandum on the face of the proceedings, that the "defendant had been previously convicted of a similar offence;" and, secondly, to the fact, that he gave a contradictory and unsatisfactory explanation as to the manner in which, and the place where he intended ultimately to dispose of the meat in the basket. The majority of the Judges of the Court of Appeal, after reciting in their judgment the evidence in the case, go on to remark that "if this case (a criminal one) were tried before a jury, the verdict would turn on the question whether the jury believed that the appellant had the meat in the basket in Dalkeith Road with the intention of selling it, or, in other words, whether the appellant was a hawkker of meat within the prescribed limits." I scarcely think that the Judge in such a case would be authorized to put the question in that way to the Jury. For two reasons. The first is that the charge on which the appellant was tried was "for exposing butchers' meat for sale;" and, in the second place, the section of the Act which gave the magistrate jurisdiction to try the case, and without which he would have had no jurisdiction to entertain it, says nothing about "having meat in possession with the intention to sell it, or to expose it for sale." If the clause had provided for such an offence, then the fact of the appellant having been previously convicted of a similar offence would be evidence to show the intention in the present case, it being, as is well known, very ordinary practice in the criminal courts where a prisoner is charged with knowingly uttering counterfeit coin, to show that he had been previously convicted of a similar offence. And the same thing may be said with regard to the unsatisfactory explanation which the appellant gave concerning the meat. But in the present case, section four provides for two offences only—one is "exposing meat for sale";—the other is "selling butchers' meat." It is to be observed that the second section of the Act defines the meaning of only the word "animal," wherever it occurs, and the words "butchers' meat" whenever they occur. The Act nowhere defines the meaning of the word "expose" as used in the Act; and in this respect let us compare "The Butchers' Meat Act" with the Act of the 6th November 1876, regulating the sale of liquors by retail. The second section of the last mentioned Act says that "For the purposes of this Act the terms "expose" "exposure" or "exposing for sale" shall mean having for sale or barter any spirits * * * placed, exposed or concealed in any shop or building fitted up and used as a shop and opened to the public as customers." Now, even under this Act the "concealment" which is declared to be the same thing as "exposure" must be on the defendant's own premises. But the last mentioned point need not be discussed at present. I have referred to the retail of Liquors Act, which makes it manifest that the word "expose" as used in the Butchers' Meat Act is employed in the ordinary sense of the word; which is, to lay open, to disclose, to draw from concealment, to

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uncover. And in construing a penal Act as this is under which the appellant was charged, the court must apply the rule laid down by Lord Tenterden in *Proctor v. Manwaring*, 3 B. and A., 146. That was a case to recover penalties for breach of the provisions of an Act of Parliament. The learned Judge said, "this being a penal clause in this Act of Parliament must not be extended by construction; and though there may be cases suggested, falling within the mischief intended to be prevented by the Legislature, yet, if they have not used proper words, so as to include them within the prohibition, it is not competent for the court to extend the Act of Parliament to them by construction." In the case before the court to-day, whatever might have been the intention of the appellant—so far as the evidence goes, he did nothing whatever towards "exposing" his meat. On the contrary, he refused to let the shopkeeper see it when asked to be allowed to do so. And if the circumstance of the meat having been seen through the wicker work of the basket amounts to an "exposure for sale" within the meaning of the Act, then every butcher passing from any parish through the prohibited area having butchers' meat in a similar basket, is liable to be convicted of "exposing butchers' meat for sale," even though he proved that he had engaged to deliver his meat to some customer miles away from the limits of the City. The question is not in anywise one of intention, but of actually doing something amounting to "exposure" and "for sale" in the ordinary meaning of the word "exposure." For these reasons I do not see that I can do otherwise than hold that, in this case, there was "no exposure of butchers' meat for sale" within the meaning of the Act. If the Legislature meant to make "the having in possession butchers' meat within the prohibited area with the intention to expose it for sale" an offence, they have not said so in the Act; and Lord Tenterden lays it down as I have shown, that in such case the court really has no power to enlarge the words of the statute by construction, to embrace something seemingly within the mischief, but which is not within the words of the enactment. Under the circumstances, I see no course but to reverse the decisions of the courts below, and quash the conviction.

ALTHEA J. BELGRAVE v. DANIEL HUNT.

(In Error October 10th 1890.)

His Honour Sir CONRAD REEVES, Kt. C. J.

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Mr. Goodman appeared for appellant. Respondent appeared in person.

Mr. Goodman addressed the Court taking exceptions to the proceedings sent up to the Court of Error, one of which was that they were nowhere certified as required by section 6 of the Court of Error Act of 7th February 1887. Another objection was that

the proceedings were incomplete, inasmuch as certain evidence taken in the case before the Court of Appeal, as the Judges themselves stated on the face of the papers before this court, was nowhere to be found upon the proceedings.

His Honour said that the objections raised were no doubt good, but no purpose could be served by returning the proceedings to the Court of Appeal. He had already sent them back asking the Court of Appeal to supplement them by supplying certain information indispensably necessary to enable this court to review the decisions appealed from. The Court of Appeal professed to be unable to supply the required information, although they stated that it had been put in before them as evidence, and the Court of Error Act, 1887, gave this court no power to compel the Court of Appeal to supply the information. Mr. *Goodman* said that unless the proceedings were made more complete he would have no case for the appellant, and he wished the hearing of the appeal postponed that he might take measures for having the proceedings made more complete by the Court of Appeal.

His Honour said that counsel could only do so by applying for a rule in the nature of a mandamus under the recent Act. It was, however, too late to take that course as the appeal to this court had been pending since July. The matter could not be any further postponed.

Mr. *Goodman* declined to argue the case unless he had fuller and more correct proceedings.

His Honour said that he had no other course but to confirm the decision of the Court of Appeal; and it was the merest formality for him to do so. The entire proceedings sent up to this court consisted substantially of the judgment in writing of the Court of Appeal, the plaint filed in the Petty Debt Court of Bridgetown was not sent up to enable this court to ascertain whether the appellant was sued as a *femme sole* or as a married woman: if she was sued as a married woman in respect of her separate property then of course execution must have been limited to her property and could not be extended to touch her person. That was the case of *Scott v. Morley* 20 Q. B. D., cited in the court below by Mr. *Goodman*. But the Court of Appeal (in the proceedings sent up to this court) stated in the course of their judgment, that there was nothing in the case or on the evidence to show that the appellant was or ever had been married; and they went on to state that in the Minute Book of the Petty Debt Court of Bridgetown judgment was entered up against the appellant as a *femme sole*. Even in that case, if an order of attachment for default of payment was applied for, the Judge of the Petty Debt Court might have refused to make it unless he were satisfied that the judgment debtor possessed or had possessed the means of satisfying the judgment. But there was nothing upon the proceedings to show upon what grounds judge *Evans* refused to make the order to commit the appellant, from which order the respondent appealed to the Assistant Court of Appeal. This court had really been left to collect from the language of the judgment of the Court of Appeal the grounds upon

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which Judge *Evans* had refused to make the order for commitment. From the remarks of the appellant's Counsel to-day and from the case of *Scott v. Morley* which he had cited in the court below, it would appear that the ground on which he rested his case was that the appellant was sued as a married woman, and that the judgment really was against her as such, and affected her separate estate but not her personal liberty. But there was nothing clear in the proceedings before this court to show that appellant was sued as a married woman in respect of her separate estate, or that the question of her coverture was in any way raised in the Petty Debt Court. Hence this court had no alternative out of the slender materials before it but to confirm the decision of the court below. This court would make no order with regard to costs.

REID v. BECKLES.

(In Error 8th May 1891.)

His Honour Sir CONRAD REEVES, Knt. C.J.

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Mr. *Clarke* appeared for appellant; Mr. *Greaves* for the respondent.

THIS was an appeal from the decision of the Assistant Court of Appeal, in the exercise of its original jurisdiction. The respondent *Sarah Ann Beckles*, brought an action, on the 10th day of February, against the appellant *Chas. Reid*, to recover possession of 40 perches of land in the parish of St. Philip, value £50. The court, after hearing the evidence of the witnesses for the plaintiff, considering the documentary evidence put in, and hearing Counsel on both sides, found a verdict for the plaintiff. The defendant adduced no evidence, relying upon the Statute of Limitations as a bar to the plaintiff's claim. The following is the judgment of the Court of Appeal which sets out all the facts in the case :—

REASONS FOR DECISION.

The plaintiff in this action, *Sarah Anne Beckles*, was formerly *Sarah Anne Blades* but married (see certificate marked 'A') *Charles Beckles* on April 12th, 1855, and became a widow on December 8th, 1890, the date of the death of the said *Charles Beckles*.

At the time of her marriage the plaintiff was possessed in fee simple of 1 rood of land which had been granted to her by the indenture of *J. C. Blades* to *S. G. Gooding* and *J. E. Blades* dated the 11th June, 1853, produced from the Colonial Secretary's office, and this rood of land she now seeks to recover from the defendant *Charles Reid*.

Mr. *Clarke*, the defendant's Counsel, waived proof of the fact that the 1 rood now held by the defendant and sought to be recovered in this action was the same rood of land mentioned in the said Indenture. At first he raised the point that the legal estate did not pass to the plaintiff by the said Indenture but was

vested in the said *S. G. Gooding* and *J. E. Blades* as trustees, but subsequently in his argument he virtually abandoned this contention.

Charles Beckles owned 20 perches of land with a stone wall house thereon butting and bounding on the one rood above mentioned belonging to his wife.

On the 23rd February, 1864, the said 1 rood and also the said 20 perches of land were taken in execution by the Provost Marshal to satisfy a judgment debt due by *Charles Beckles*, the husband of the plaintiff, to *Joseph Reid*, the father of *Charles Reid* the defendant (see execution *Reid v. Beckles* with Marshal's return thereon marked B).

The Appraisement proceedings put in evidence and marked "C" show that the land so attached was duly appraised, and that the judgment creditor *Joseph Reid* gave the usual guarantee of indemnity to the Provost Marshal for bringing it to sale.

From the "Sale Memorandum" marked "D" it appears that the life interest of *Charles Beckles* in the said 1 rood of land was sold along with his 20 perches of land under the aforesaid execution. It will be noted from the evidence of the plaintiff, that in 1864—the period of the above proceedings in the Provost Marshal's office—*Joseph Reid* entered into possession of the land which had been levied on and sold.

The Marshal's "Return of Re-attachment" put in evidence and marked "E," proves that the above mentioned 1 rood of land along with the said 20 perches of land was re-attached by the Provost Marshal from *Joseph Reid* on the 24th August, 1872, and in the said document marked "E," the land re-attached is described as that which had been attached from *Charles Beckles* and sold to *Joseph Reid*.

The plaintiff's witness *Inniss* proved that *Joseph Reid* was in possession of the 1 rood of land in question to the time of his death—some 6 or 7 years ago—and that at his death the defendant *Charles Reid* his son, took possession thereof and still retains the same.

The defendant gave no evidence and tendered no witnesses, his counsel intimating that he relied on sections 15 and 16 of Act 253, which limited an action by the plaintiff to within 20 years after 1864.

The *Solicitor General* for the plaintiff contended that under section 16 of the Statute of Limitations, time only began to run against his client "from the time at which her right to make an entry, &c., shall have first accrued," and that in this case was the 8th December, 1890, the date of the death of her husband. He relied on the case of *Jumpsen v. Pitchers*, 13 Simon, p. 2, in which it was laid down that a woman could bring an action to recover her land on the death of her husband after the expiration of 40 years (the corresponding period to the term of 20 years in Barbados) where she was debarred by law from entry during his lifetime by a disposition by him of his rights in her land.

The defendant's counsel objected to "Sale Memorandum D" being admitted in evidence, as it was not proved in whose handwriting it was, and contended that there was no evidence to

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show that *Joseph Reid* had bought the 1 rood of land in question from the Provost Marshal under legal process against *Charles Beckles*, the plaintiff's husband.

The court on proof on oath that the document was in the handwriting of the person who was chief clerk in the Provost Marshal's office in 1864, and in view of the fact that it now came from proper custody, held that it was *prima facie* authentic and admitted it, but held further that, whether the Sale Memo., 'D' was admissible or not, there was sufficient evidence without it to warrant the court in finding as a fact that *Joseph Reid* did buy the land in question from the Provost Marshal under legal process against *Charles Beckles* the plaintiff's husband, as the return of re-attachment marked "E," to which no objection had been taken, referred in terms to the sale of the said land to the said *Joseph Reid*.

The defendant's Counsel next urged that, assuming *Joseph Reid* to have purchased from, and been put in possession of the land as purchaser by the Provost Marshal, the re-attachment in 1872, proved that he did not complete his purchase and obtain a conveyance from the Provost Marshal, that therefore under the provisions of sections 2 and 5 of Act 1889, he became a trespasser as from the expiration of 1 year from the date of purchase, and consequently, the 20 years began to run in his favour from that time, and that the fact that he was a trespasser distinguished this case from *Jumpsen v. Pitchers*.

The court were of opinion that under any circumstances the 20 years could only be held to run in favour of the defendant as from the 24th August, 1872, the date of the re-attachment, by the Provost Marshal; but, apart from this, the court were satisfied that this case came within the principle laid down in *Jumpsen v. Pitchers*, even if *Joseph Reid* did not complete his purchase and obtain a conveyance.

The reason for the decision in *Jumpsen v. Pitchers* points to the following distinctions: Where land held in fee by a married woman is, during her husband's lifetime, abandoned by her husband and herself to a mere trespasser, where she sits quiet and never exercises the right to enter on the land and disturb the trespasser, then the period of 20 years (40 years in England) during which an action must be brought under section 16 of Act 253, begins to run as against her from the time of hostile entry, and runs during her husband's lifetime; but where the husband's life interest is legally transferred to another and the wife is debarred by law from making any entry on her land until her husband's death, then the period named in the Statute of Limitations only begins to run against her as from the time of her husband's death.

In the present case the plaintiff was debarred by law from entering on her land from the time the Provost Marshal took it out of her possession until the date of the death of her husband. The Provost Marshal's Acts 89 and 196 gave him the right to enter on the land on non-fulfilment of the statutory conditions of sale by *Joseph Reid*, but confers no such right on the plaintiff.

It should be noted, that although the defendant relied on

the Statute of Limitations for a defence, no statutory notice of such defence was given. (See Assistant Court of Appeal Act 1891, section 21—The Petty Debt Act 1890, section 31, and Order VIII Rule 8 of the Assistant Court of Appeal Orders and Rules)—No objection to this omission was taken by plaintiff's Counsel, and the court did not at the hearing consider the question whether the defendant could claim to have the benefit of any Statute of Limitations without such notice). See section 31 of the Petty Debt Act, 1890).

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 J. GITTENS KNIGHT.

In the Court of Error, *Mr. Clarke*, in support of the appeal, contended that the respondent's right of entry accrued in 1865—a year after the sale of the land when the purchase was not completed, and therefore she and her husband ought to have brought an action to recover possession of the land, and as she did not bring her action until this year she was barred. The *Solicitor General* for respondent, argued that her claim was not barred. It had been proved in the court below that her husband's life estate in the land was attached in 1865 by the Provost Marshal to satisfy a judgment recovered against him, wherefore possession vested in the Provost Marshal until the land was sold. The taking of the land in execution made the respondent's then present estate an estate *in futuro*. Therefore it did not become a present estate entitling the respondent to enter or bring an action to recover possession until her husband died and his life estate ceased. He died in December last year, and the action was brought in February last, so that she lost no time. The following is His Honour's judgment intended for record on the Minutes :—

This is an appeal from the decision of the Assistant Court of Appeal in the exercise of what is known as its original jurisdiction. The respondent, a widow female of the name of *Sarah Ann Beckles*, brought a claim in ejectment on the 10th day of February last to recover possession of 40 perches of land in St. Philip's parish, value £50, held by the appellant, one *Charles Reid*. The court, after taking evidence and hearing Counsel on both sides, found for the respondent. It appears that the land in question was, by deed, conveyed by one *John Conner Blades* in the year 1853 to two trustees and their heirs to the use in fee tail of the respondent—the said trustees “to suffer and permit the respondent to occupy the land” or “to receive and pay over the rents and profits to her for her maintenance during her minority.” The respondent intermarried with one *Charles Beckles* in 1855. A person named *Joseph Reid*, the father of the appellant, in 1864 recovered judgment in the Court of Common Pleas in an action brought by him against the husband of the respondent, and in the same year, whilst the respondent and her husband were in possession of the land in question, the husband's life estate in the said land was attached by the Provost Marshal to satisfy the said judgment. The judgment creditor, as the Court of Appeal

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finds as a matter of fact, purchased the land from the Provost Marshal. He seems not to have completed the purchase within the provisions of the Act,—therefore got no conveyance and the land was re-attached by the Provost Marshal on the 24th day of August, 1872. *Reid*, however, evidently remained in the actual occupation of the land, upon what terms did not come out at the trial. He died six or seven years ago, and the present appellant, his son, continued, it would seem, the occupation of his father. Respondent's husband died on the 8th day of December last year, and she, after demanding possession from appellant, brought her action in ejectment as I have stated. Of course, in an action of ejectment the plaintiff alleges in his writ that he was at a particular date legally entitled to the actual possession of the land; and, as a general rule, the action must be brought within the time allowed by the Limitations Act, that is, within 10 years next after the time at which the right of entry first accrued, the plaintiff being further bound to show at the trial that he has a legal right to the actual possession of the land. And even if the plaintiff, as in the present case, is under a disability, such as coverture, she must at any rate bring her action within 20 years after her right of entry first accrued. In all these cases—and it is the same in the present—the main point, I may say, to be determined is—from what event or period the Act begins to run, or, in other words, at what date the right of entry accrued: and it often is a point of some difficulty. The respondent's Counsel, the *Solicitor General*, contended in the court below, as he has contended here, that her right of entry did not accrue until December last when her husband died, inasmuch as the husband had a life estate in the property which was levied upon to satisfy his debt, and the life estate did not fall in until the husband died, wherefore respondent had no right of entry until then: in other words, that the legal right to actual possession by her was postponed to that period. Mr. *Clarke* for appellant contends, and certainly with ability and considerable ingenuity, firstly, that it was not proved at all at the trial that *Reid* purchased the land from the Provost Marshal, and he refers to the evidence of the respondent, where she says,—“I was put out of possession of the land in question in February 1864, by *Joseph Reid*, father of defendant”; and secondly, he contends—even if that were not so, and that the land was purchased by *Reid* from the Provost Marshal in 1864, he did not complete the purchase and get a conveyance at the end of 12 months as the law required, and, therefore, that from that period—the expiry of the 12 months—*Reid* became a trespasser, holding adversely to the respondent and her husband who might have recovered possession of the land. They did not do so, or do anything, consequently the statute began to run against them from the year 1865 or 1866. That being so, that the re-attachment in 1872 of the land did not stop the running of the statute, therefore 24 years at least had passed since the respondent's right of entry had accrued, and she was completely barred by the express terms of section 16 of the Limitation Statute. With regard to the first point, the documentary evidence put in at the

trial showed that the land was sold by the Provost Marshal to *Reid* senior in 1864, and re-attached in 1872, for non-completion of the purchase. But that is a point I need only deal with in passing, because the court below has found that, as a matter of fact, and I am therefore precluded from discussing the particular point. As for the second point made by the learned Counsel, the husband and wife were seised in fee of the land in right of the wife, and, moreover, as there were children of the marriage, the husband had a life estate by the curtesy. That life estate was legally attached by the Provost Marshal to satisfy a judgment recovered against the husband. It is not a case in which the property was abandoned by the husband and wife, whereby the possession became derelict, or where a stranger put out the owner, as in effect is contended, entered and kept possession for 10 or 20 years. If that were so, inasmuch as the husband and wife conjointly would always have had in law, during those 10 or 20 years, a present right of entry, adverse possession for that time would cover the entire period of limitation, and the wife herself at the end of 20 years, her coverture notwithstanding would be barred. This was the law of the case *Doe v. Bramston*, 3 A., and Ell., 63. But the present case is clearly distinguishable from that. The husband's life estate was legally attached, which had the effect of converting that which was the wife's then present estate, carrying with it the right of actual possession, into a future estate. Therefore, as the *Solicitor General* for respondent has clearly shown, the case comes within the 4th provision of section 3 of the Act. That provision is—that the right to make an entry or bring an action to recover land, shall be deemed to have first accrued (in case the estate claimed is *one* in reversion or some other future estate)—only when such future estate shall become an estate in possession. The respondent's estate having been made an estate in reversion, manifestly she was not entitled to the actual possession until her husband died, when that became a present estate. By the provisions of the Provost Marshal's Act that officer is empowered to take possession of the lands levied upon, and hold possession until sold. Mr. *Clarke* says that *Reid* was a trespasser at the end of 12 months after he purchased, and held adversely from that period. He was, it might be, a tenant at will of the Provost Marshal, who had put him in possession, and perhaps would have been a trespasser if he had refused to render up possession on demand by the Provost Marshal. But even if he were a trespasser he did not hold adversely as against respondent, because she was not entitled to the possession at all while the judgment remained unsatisfied, her husband being alive. The possession would have been adverse as against the Provost Marshal, because that officer was distinctly empowered to take and hold possession until the property was sold to satisfy the judgment. Counsel says that respondent and her husband had a right to enter and therefore to bring an action in 1864 when *Reid* failed to complete his purchase, and get a conveyance. Suppose they had done so, they must, to succeed, have shown that they were legally entitled

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to actual possession, while the counsel for the defendant would have shown that the Provost Marshal was the person entitled to the possession. That must be so, for the Act says that he is to retake possession, when the purchase is not completed, and keep it. And that is the difference between the present case, and the case of *Doe v. Jones* which Mr. *Clarke* cited. In that case, the Sheriff took in execution a term of years, and the judgment creditor, as in the present case, purchased and took possession: but no assignment of the term was executed—just as in the present case there was no conveyance by the Provost Marshal. The court held that the term remained in the debtor, with a present right of possession—that he was therefore entitled to recover. In that case the judgment debtor always had a present right to bring his action, because once the Sheriff had sold, he was out of possession and could not retake possession: but in the present case, apart from other considerations, the non-execution of a conveyance of the husband's life estate to the purchaser did not give the respondent a present estate in possession, and consequent right to bring an action, because the possession was still in the Provost Marshal. An estate of course always remained in the respondent, but it was not a present estate entitling her to actual possession, until the husband died. That is what the court below decided, and I think that they came to a right decision, which I now confirm, dismissing the appeal with costs.

WILLIAM WHITTAKER v. JAMES W. PARRIS.

(*In Error*, 4th September, 1891.)

HIS HONOUR SIR CONRAD REEVES, Kt. C.J.

Mr. GREAVES appeared for Appellant.

Respondent appeared in person.

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THIS was an appeal to the Court of Error against the decision arrived at by the majority of the Judges of the Assistant Court of Appeal made in the exercise of its Appellate Jurisdiction on the 1st June, 1891, reversing a decision of *W. H. Whitehall*, Esq., Police Magistrate of District "D" on the complaint of the respondent (in this court) against the appellant for a breach of contract of service as a located labourer.

Reasons of the majority of the Judges of the Assistant Court of Appeal for their decision.

In this case *J. W. Parris* appealed from a decision of Mr. police magistrate *Whitehall*, who dismissed on the merits a complaint preferred before him under section 3 of the Act No. 128, by the said *J. W. Parris* against *William Whittaker*, as a located labourer on *Ayshford* estate, the property of the appellant, for having neglected to perform his stipulated work, by absenting himself therefrom without leave or lawful excuse on the 7th, 8th, 9th, 10th, and 11th April 1891.

The respondent admitted in the court below that he did not work for the appellant on the days specified in the complaint.

It was proved on behalf of the appellant that the respondent held as an incident to service certain land the property of the appellant, and this the respondent did not deny. It was also proved that the respondent worked for about (1/) one shilling per diem.

The respondent, however, before the police magistrate raised the defence that the appellant had given him four weeks' notice on the 9th March, 1891, to quit his service, and that the alleged offence took place subsequent to the expiration of that notice.

The point for the Assistant Court of Appeal was therefore simply this—whether that contention on the part of the respondent was correct or not.

By section four of the amending Act of the 3rd April 1883, one month's previous notice is necessary to terminate a tenancy or occupancy held as an incident to service, except in the case of domestic servants. If the provision of this section were to be held as imperative, then, of course, *cadit questio*, inasmuch as no such notice was given by appellant.

But supposing that provision to be directory and not imperative, as we hold, it was quite within the right of the parties to the contract to terminate the same by a notice of shorter duration than that named in the Act of 1883. The length of such notice, however, in the face of such provision, ought to have been clearly understood by both sides—clearly given by one and accepted by the other party to the contract.

We find, however, as a matter of fact that no notice for the termination of the contract was either given by the appellant or accepted by the respondent in this case.

Mr. *Parris*, the appellant—the complainant in the court below—says, touching the notice supposed to have been given the respondent on the 9th March :- “I told him,” meaning the respondent, “the matter could easily be settled by a four weeks’ notice.....I consider that what I said to respondent on the “9th of March (the words just quoted) may have been taken as “a notice to quit the estate or not.....Respondent afterwards “went to cut the canes, and that settled the matter as far as I was concerned.” We hold that such a notice was no notice. It seems clear to us from these statements of Mr. *Parris* that what he said to respondent on the 9th of March was said more with the intention of coercing the respondent into the performance of his work by the threat of a four weeks’ notice to quit, than as a clear and distinct notice to leave. The subsequent conduct of the respondent in going off to cut the canes appears to have satisfied the appellant that respondent had not accepted the notice, such as it was; and the subsequent conduct of the appellant in not taking any steps to compel the respondent to give up his holding and leave the estate showed that the appellant had also waived the notice.

Next, as regards the action of the defendant. It is true the respondent replied, when the appellant told him on the 9th March “the matter could be settled by a four weeks’ notice,” in his

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words "Yes Sir," and according to Mr. Parris, "I will go"; *but it is to be noticed that he immediately went off to cut the canes without having had his condition complied with, viz., the having a particular person to load after him; and further up to the date of the complaint being preferred before the police magistrate, the respondent did nothing, either in getting his crop reaped, or in having it appraised, or in removing his house, to manifest in any way that he had accepted the notice the appellant had given him on the 9th of March.*

For these reasons, we hold that notice to quit the holding on the property of the appellant was neither given nor taken on the 9th of March by either of the parties to the complaint; or if given and taken it was subsequently waived by the conduct of both parties. The respondent therefore never ceased to hold land as an incident to service the property of the appellant up to the date of the complaint, and we find as a matter of fact that the respondent was a servant of the appellant on the days named in the complaint. The respondent having admitted that he did neglect to perform his stipulated work on those days, we are of opinion that the police magistrate was wrong in dismissing the complaint, and we reverse his decision.

N. F. BRIGGS.

J. GITTENS KNIGHT.

Mr. Justice Chandler's reasons for dissenting from the decision of the majority of the court.

In this case the defendant was an agricultural labourer on the plantation of the complainant, renting a piece of land incident to service, which means that the defendant rented the piece of land at a fixed weekly rent due every Saturday, but was under an agreement to pay that rent in labour performed during the week.

By section 4 of "The Contract Act amendment Act 1883," either landlord or tenant who desire to terminate such tenancy must give one month's notice to the other party.

I agree with the majority of the court that it is quite competent for either party to give to the other a shorter notice than one month, if that other party agrees to accept the same.

According to the evidence of the honourable J. W. Parris, it appears customary among landlords and tenants incident to service to regard the necessary notice as "four weeks' notice," and this, I suppose, is due to the fact that the tenancy is a weekly one, and so a four weeks' notice is more easily reckoned, and more convenient for all parties. Mr. Parris says "I told him the matter could be easily settled by a four weeks' notice"—"a four weeks notice is the common mode of expression amongst the labouring class for a month's notice."

On Monday, the 9th March, 1891, the complainant gave the defendant a four weeks' notice to quit. Mr. J. W. Parris, Jnr., who appeared as agent for the complainant in the magistrate's court, said there, in answer to the defendant, "on the 9th March,

the complainant used words to you which were tantamount to a four weeks' notice to give up your land."

In the Assistant Court of Appeal, he says: "on the 9th March, appellant (Mr. *J. W. Parris*, Snr.,) told respondent in my presence that he would have to give up his tenement in four weeks. But that was not a legal notice, as the Act says that the contract shall be terminated by one month's notice." Mr. *J. W. Parris* Snr. says, "When I gave respondent notice on the 9th of March I intended it in the alternative. What I mean is that if he went on with his work in a satisfactory manner I was ready to waive the notice. Failing his doing so, I considered that I should have been justified in acting on the notice." The Act does not recognize any conditional notice. Either there was a notice or none. If Mr. *Parris* thought he could act on the notice and eject the defendant at the expiration of the period, there was a notice, so far as he was concerned.

Next, did the defendant accept the "four weeks notice"? Mr. *J. W. Parris*, snr., says: "When I used the words, respondent said that he would go." Immediately on receiving the notice defendant set about his work and worked every day from

Monday, March 9th, to Saturday, March 14th.

" " 16th, " " " 21st.

" " 23rd, " " " 28th.

and " " 30th, " " April 4th.

and from the last mentioned date he left *Ayshford* plantation and worked elsewhere until after the complaint was lodged against him by the complainant. Mr. *J. W. Parris*, Snr., says, "I lodged my complaint against respondent on the 13th April. On the following day he returned to work, and worked four days."

I fail to see how the fact that the defendant worked from March 9th to April 4th (the expiration of the fourth week from the date of notice) can in any way prejudice his position, or be held to evidence of a waiver of the notice on his part. He was obliged by law to work during the four weeks that the notice was running, and could have been punished for not doing so.

Nor do I see how the defendant can be affected by what happened after the commencement of these proceedings against him.

The fact that the defendant did not immediately move his house on the expiration of the four weeks, but that (to use the words of Mr. *Parris* Jnr.) "his concubine applied to rent the land, and I told her that respondent was the tenant," does not, in my opinion, renew the tenancy, which came to an end at the expiration of the four weeks: as under section 6 of "The Contract Act 1840," it was for the complainant to have the defendant ejected.

I agree with the police magistrate's decision.

W. K. CHANDLER.

8th July, 1891.

The following is the decision in the matter delivered by His

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Honour Sir CONRAD REEVES, Knight, sitting as a Court of Error, on the 4th September, 1891, after hearing the arguments put forward by Counsel for appellant :—

This is an appeal from the decision of the Assistant Court of Appeal in the exercise of its appellate jurisdiction under the following circumstances :—The respondent in this court, the honourable *J. W. Parris*, proprietor of *Ayshford* plantation in the parish of St. Thomas, lodged an information or complaint against the appellant *William Whittaker*, in which he alleged “that the said defendant (present appellant) being a located labourer on *Ayshford* estate in the parish of St. Thomas, did, on the 7th, 8th, 9th, 10th and 11th April, 1891, neglect to perform his stipulated work by absenting himself therefrom without leave or lawful excuse.” The complaint was therefore brought under Act 128, known as the Contract Act, which was passed in 1840, soon after the Emancipation, to regulate the hiring of servants, both domestic and servants in husbandry, and to provide for the recovery and security of their wages on the fulfilment of their contracts of service. Under this Act if a labourer be located on plantations and hold and cultivate land as incident to service the servant or labourer enters into contract to work on every working day on his employer’s plantation unless he has lawful excuse for absenting himself, and the master on his part impliedly contracts with the labourer to furnish him every working day with employment at the current rate of wages ; and either party may terminate the contract by giving the other a calendar month’s notice—(*Whittle v. Frankland*, 31, L. J. M. C. p. 81) the right being specially reserved to the labourer, where the master gives him notice to terminate a tenancy, to be paid the value of his growing crops, if any. In the present case, the appellant on appearing to answer the summons before the magistrate pleaded “not guilty,” and on being examined on oath said, in effect, that on the 9th day of March last, the appellant said to him, “I give you four weeks’ notice.” You will take four weeks’ notice from to-day, and I said yes.” He continued, “I do not deny that I did not come out to work on the days specified in the complaint, but I considered that I did not belong to Mr. *Parris* then, as he had given me notice, and the four weeks were out.” Therefore there was no question in the case that there was a contract under the Act between the parties, and the only issue was whether at the respective dates mentioned in the information the contract was subsisting or had terminated. After the examination of the respondent’s manager and agent, Mr. *J. W. Parris, Jr.*, the magistrate dismissed the complaint on the merits and an appeal was entered on behalf of the present respondent, the complainant in the magisterial court. The appeal came on to be heard in the Assistant Court of Appeal, and, in the result, the majority of the judges reversed the decision of the magistrate, ordering the then respondent to pay one shilling for each day that he was absent from his employment and the costs of the magisterial court, amounting to five shillings. Mr. Justice *Chandler* dissented from the judgment of his colleagues. There was an appeal in Error from that decision ; and the question for

this court is, whether the decision of the magistrate, *Mr. Whitehall*, is correct in point of law, or that of the majority of the Court of Appeal.

The facts are clear, and in no way disputed, so that the issue of law arising out of those facts stands out clearly before this court. With regard to those facts, first of all we have *Mr. James Wm. Parris, Jr.*, stating in the magisterial court that "on the 9th day of March, the complainant used words to the defendant which were tantamount to a four weeks' notice to give up the land;" and he further stated "that the defendant had told him that he had received notice from the complainant to give up the land. The same witness stated in the Court of Appeal, "on the 9th of March, appellant told respondent in my presence that he would have to give up his tenement in four weeks. The witness continued, "But that was not a legal notice as the Act says the contract shall only be terminable by one month's notice." The witness further stated, which is also very important, that "the respondent paid rent for the four weeks covered by the notice given him by appellant, but he has not paid any rent since." The appellant in the court below, the honourable *Mr. Parris*, was also examined in that court. He proved that he was the owner of the plantation in question, and that the present appellant, *Whittaker*, was a located labourer—two points in no way in dispute. The witness then went on to say, that on Monday, the 9th of March, he was in the boiling house. "*Whittaker* came there and in my presence told the deputy manager, *Mr. J. W. Parris*, that he would not cut any canes on the estate unless he were allowed to select the person who was to load them. I told him the matter could easily be settled by a four weeks' notice. Respondent—meaning *Whittaker*—continued to work on the estate up to the 4th day of April." The witness further said: "I consider that what I said to respondent on the 9th day of March may have been taken as a notice to quit the estate or not. When I used the words, respondent—meaning *Whittaker*—said, "I will go"; but he has not since shown that he has accepted the notice. When I gave respondent notice on 9th of March I intended it in the alternative. What I mean is that if he went on with his work in a satisfactory way, I was ready to waive the notice. Failing his doing so, I considered that I should have been justified in acting on the notice." It is to be noted in this connection that the present appellant, *Whittaker*, put to *Mr. Parris* a very astute question, to which, according to the proceedings sent up to this court, that gentleman gave the following most important answer—"I never told you that I was willing to waive the notice."

Now, looking at the evidence, it is very clear that when the present appellant refused to perform his stipulated work on the 9th March, unless he were allowed to select the person to load the canes he was required to cut, he was, at the moment, liable to be summoned before the magistrate under the Act for breach of his contract. Had *Mr. Parris* summoned him under clause 3, the magistrate, supposing the complaint was established, would have been empowered to impose a fine not exceeding a

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month's wages, and he might also have dissolved the contract ; in which case under, section 6, if the appellant had refused to give up possession of the land he held as incident to service after 24 hours' notice, he was liable to be removed and expelled therefrom by an order under the hand of the magistrate. But it seems from the proceedings that Mr. *Parris* took the more generous course of giving the appellant four weeks notice, which, supposing that was a sufficient notice, then brought the matter within the purview of the Act, No. 206, of the 12th January 1850, defining the course to be taken for the recovery of possession of tenements after due determination of the tenancy. The question as I have already said, is, did the present respondent give the appellant on the 9th March notice to quit as required by law, and had that notice expired on the 7th April when the appellant absented himself from work. The majority of the Court of Appeal in their judgment says, "That they found as a matter of fact that no notice for the determination of the contract was either given by Mr. *Parris* or accepted by *Whittaker*." In support of this they quote the evidence of Mr. *Parris* as to what passed between him and *Whittaker* on the 9th March ; and the judges go on to observe that they held that what Mr. *Parris* said was no notice at all. They continue, "it seems clear to us from these statements of Mr. *Parris* that what he said to the respondent on the 9th March was said more with the intention of coercing the respondent into the performance of his work by the threat of a four weeks' notice to quit, rather than as a clear and distinct notice to leave. The subsequent conduct of the respondent in going off to cut the canes appears to have satisfied the appellant that respondent had not accepted the notice such as it was, and the subsequent conduct of the appellant in not taking any steps to compel the respondent to give up his holding and leave the estate showed that the appellant had also waived the notice." And the learned judges seem to have attached great weight to *Whittaker's* going off to cut the canes after he had told Mr. *Parris* that he would go at the end of the four weeks. This and other conduct on the part of *Whittaker* satisfied the court that he had not accepted the notice given him by Mr. *Parris* on 9th March. The court seem to think that the provision of the Act of the 3rd April 1883 which declares that "it shall not be lawful either for the master or landlord or for the servant or tenant to terminate the tenancy otherwise than by giving to the other party one month's previous notice," is imperative ; but they are of opinion that it was quite within the right of the parties to the contract to terminate the same by a notice of a shorter duration than is named in the Act of 1883. The judges are of opinion, however, that, in the face of the provision of the Act, the shorter notice ought to be clearly understood on both sides—"clearly given by one and accepted by the other party to the contract." My own opinion also is that the provision of the section referred to is imperative, and moreover that it is not competent, even by mutual agreement, to override the provision ;—and if in the present case the man *Whittaker* had come

before the court and complained that Mr. *Parris* had given him four weeks' notice instead of a calendar month's notice the question would have assumed a different aspect. But it cannot be overlooked in the present instance, that it was Mr. *Parris* himself, the present respondent and the complainant in the magisterial court, who gave *Whittaker* the four weeks' notice to terminate the tenancy; and that being so, on clear and well-recognized principles of law, Mr. *Parris*, cannot be heard when he alleges that the notice given by himself was legally insufficient. As the lawyers express it, Mr. *Parris* is estopped from raising any such contention. It is a fundamental principle of law, say the judges, that a man cannot for his own advantage derogate from his own deliberate act. Estoppel signifies an impediment or bar to a man's invalidating his own act. It is a clear rule, says Lord *Campbell*, in a case in the 2nd *Ellis & Blackburn*, that if a party makes a representation (and a notice to quit comes within that definition) to another, meaning it to be acted upon, and it is acted upon, that gives rise to what is called estoppel. So the question really is, as the present case comes before this court, whether Mr. *Parris* did in fact give *Whittaker* the notice on the 9th March to determine the tenancy at the period mentioned in that notice. It does not matter whether it was a four weeks' notice or a calendar month's notice. The question is—whether Mr. *Parris* gave *Whittaker* in fact a notice, meaning it to be acted upon, and whether *Whittaker* acted upon it.

Mr. *Parris*, Jnr., distinctly proved in the magisterial court that the present respondent used words which were tantamount to a four weeks' notice. In the court of Appeal, indeed, he said "that on the ninth of March, Mr. *Parris* told *Whittaker* in my presence that he would have to give up his tenement in four weeks." What young Mr. *Parris* relied upon was, not that *Whittaker* had not clearly received a four weeks' notice, but that it was not a legal notice. The Hon. Mr. *Parris* as distinctly said in the Court of Appeal, that he did give the present appellant a four weeks' notice, and that *Whittaker* had also accepted it by saying "he would go." And *Whittaker's* conduct, looking at the evidence, certainly was in keeping with the letter and spirit of the notice and of his acceptance of it, for he worked on the plantation until the four weeks expired, and then ceased to work which was the cause of the complaint being lodged. The Court of Appeal says that the notice if it was a notice at all, either had not been accepted, or if it had been that the acceptance had been waived by *Whittaker*. That the notice was given on the 9th of March by Mr. *Parris* and also accepted by the present appellant is, I think as clear upon the proceedings as any fact could possibly be. It is true this notice could have been waived, but it required the assent of both parties to waive the notice and re-establish the contract. A notice to quit can be waived and a new and continued tenancy created only by the express or implied consent of both parties. Where a tenancy is determined by notice to quit and assented to, the tenancy is put an end to by the agreement of both parties, and this cannot be waived without the assent of

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both parties. The appellant's going off to cut the canes after he had received the notice and had accepted it could be no waiver in his part, because, as a located labourer, he was obliged to continue his work during the currency of the notice. But supposing that *Whittaker* had been willing to waive his acceptance of the notice, did Mr *Parris* waive it? Why in the Court of Appeal he distinctly said in reply to *Whittaker* "I never told you I was willing to waive the notice."

What the present appellant did after the notice had expired and after the complaint for breach of contract had been lodged against him, is manifestly beside the question and need not be discussed. The same may be said with regard to the appellant's taking no steps to reap his crop or to give up the land, after the notice expired. It is a common every day thing in matters of tenancy, for a tenant to hold over on the expiration of his tenancy after due notice but that of itself is no evidence of a continuing tenancy or a waiver of notice to quit. The Contract Act as well as the act for facilitating the recovery of tenements after the due determination of the tenancy, both contemplate the contingency of the tenant continuing in possession after the contract has been dissolved by the Magistrate's decision for breach or after the determination of the tenancy by due notice to quit given by the master. Both of these contingencies are provided for in the acts mentioned and the course is defined to enable the landlord to eject the contumacious tenant and get possession of his land. There is nothing therefore in the point that in the present case *Whittaker* did not quit and deliver up possession of the land held by him on the expiration of the notice. The point and the only point in the case is, whether Mr *Parris* on the 9th March gave him the four weeks' notice and whether he accepted that notice. There is no evidence in the proceedings before me to show that *Whittaker* had any rational cause of complaint whatsoever against his employer. He seems to have brought the notice to quit upon himself. But that the notice was given and accepted is clear upon the evidence, as a matter of fact; and that it is a perfectly good notice in law to bind the present respondent is equally clear to me for the reason I have already stated. Under the circumstances, I uphold the present appeal and reverse the decision of the court below restoring that of the police magistrate. The respondent must pay the costs of this appeal and costs in the courts below.

GITTENS v. THE BRIDGETOWN WATERWORKS
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(In Error 2nd October 1891.)

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His Honour Sir CONRAD REEVES, Knt. C. J.

Mr *Clarke* (instructed by Mr. Fleming) appeared for appellant. (Mr. *Goodman* instructed by Mr. Catford) appeared for the respondent.

IN this case the Bridgetown Water Works Company lodged a complaint with the police magistrate of St. Philip against the appellant Mr. *J. Adolphus Gittens* proprietor of *Oughterson's* plantation in that parish, claiming £8 10. 6. for water supplied to the plantation mentioned for a quarter according to contract, and 7/ for the hire of the meter. The company claimed to recover the amount as in the case of servants' wages under the authority of of Act No. 485 which was passed "to encourage the laying down "of water works in the several parishes of this Island." The defendant admitted the contract and that he had had the water and the use of the meter as alleged. But he put in his pleas in writing to the effect that the company could not recover judgment as in the case of servants' wages because the Act relied upon was passed to enable the Bridgetown Waterworks Company to carry out a scheme for supplying water to plantations from the springs in *Cole's Cave* which they never carried into effect. And further that the act had been in effect repealed from being repugnant to the provisions of the Water Supply Act 1886, for that upon the company's plan *Cole's Cave* was delineated. and that that Company alone can now abstract the waters. The police magistrate gave judgment for the complainants for the entire amount. The defendant appealed to the Assistant Court of Appeal which court unanimously confirmed the decision of the magistrate.

From this decision Mr. *Gittens* appealed to the Court of Error. The law involved in the appeal was argued at some length by the respective Counsel appearing on either side. The judge took time and Friday last, the 9th instant, delivered the following judgment, confirming the decision of the court below:—

This is an appeal from the decision of the Assistant Court of Appeal in the exercise of its appellate jurisdiction. The respondents in this court brought a complaint in the police magistrate's court of St. Philip to recover judgment as in the case of servants' wages, against the appellant Mr. *Joseph A. Gittens* for a debt of £8 17. 6. resulting from a contract entered into between the two parties for supplying water for the use of *Oughterson's* plantation in the said parish, of which the appellant was in possession at the date of the contract and at the time the complaint was lodged. The said complaint was alleged to be brought under the authority of Act 485 of the 4th October 1870, entitled "An Act to encourage the laying down of water works in the several parishes of this Island." The present appellant in answer to the complaint, alleged firstly that it was bad in law as the amount could not be recovered as in the case of servants' wages under the Act relied upon since that Act applied only to water supplied from *Cole's Cave* and the plaintiffs the present respondents had never carried out the scheme for utilising that spring, as contemplated by the Act and referred to in its preamble. And, secondly, he pleaded that the Act No. 485 had been "virtually repealed by the Water Supply Act 1886. The appellant at the trial admitted that the contract as alleged had been entered into between himself and the respondents and that the water mentioned in the particulars had been supplied and that

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he had had the use of the meter but that he relied upon the pleas put in by him. The magistrate decided in favour of the respondent company and gave judgment for the entire amount claimed, to be recovered as in the case of servants' wages. From that decision the appellant appealed to the Assistant Court of Appeal, which court unanimously upheld the magistrate's decision, and upon the ground substantially that the act referred to was passed to empower the respondent company to supply water to plantations or similar places in any part of the country with water from *Cole's Cave* spring or from any other streams of water, and to recover the value thereof, according to contract. as in the case of servants' wages. They also decided that the hire of the meter should be also recovered in the same way. The question for this court is—whether the decision of the magistrate and that of the Assistant Court of Appeal is right or not. And that question, which is entirely one of law, depends upon the true construction of Act No. 485 and the provisions of the Water Supply Act, 1886.

Almost the entire argument in this court was directed to the scope of the preamble of the act of 1870, and that preamble is in the following words:—"Whereas the owners of certain plantations have, by their humble petition to the Legislature of this Island, stated that the labourers and stock in many parts of the Island suffer greatly from a scarcity of good water during the dry season of the year, and that they are thus compelled to use bad water, thereby creating much sickness, and that they had applied to the Directors of the Bridgetown Waterworks Company to supply them with water from the springs in *Cole's Cave* in the parish of St. Thomas, from which a wholesome supply could be obtained, and that the Directors of the Bridgetown Waterworks Company were willing to submit a plan to the shareholders, for laying down the necessary Waterworks for that purpose provided an Act of the legislature could be obtained authorizing them to recover such rates as may be agreed on between such Company and any persons, for a supply of water prior to all other demands affecting the lands of such persons, excepting the claims of the Crown and the parochial and legislative taxes, for a term of ten years, and have prayed the Legislature to pass an Act for that purpose: And whereas the Legislature, taking into consideration that the sanitary condition of the labouring population would be greatly improved by a plentiful supply of wholesome water at all times, deem it expedient to pass an Act granting to the said Bridgetown Waterworks Company, or any other Waterworks Company that may be hereafter established, the powers prayed for in the said petition." Following that preamble, the 1st clause enacts, that whenever any contract should thereafter be entered into between "The Bridgetown Waterworks Company," or any other Waterworks Company to be thereafter established, with any person or persons whomsoever for a supply of water for the use of any sugar-work plantation or other place in this Island, the rate or rates agreed to be paid for such water shall be raised and recovered in a summary manner as in the case of servants' wages, and such rate

or rates shall rank and be paid prior and preferably to all other debts and securities, debts due to the crown and parochial and legislative taxes being saved. And the fourth clause enacts that the said Bridgetown Waterworks Company, or any other company shall have and exercise all the powers for purchasing "land and streams," and for laying down waterworks as are contained in "The Bridgetown Waterworks Company's Act of August 1857." Mr. *Clarke*, who represents the appellant, contends that the preamble of the Act No. 485 shows that the act was passed for the purpose of enabling the Bridgetown Waterworks Company to carry out a scheme for supplying plantations from *Cole's Cave* spring, and, failing their doing so, for enabling any other company to lay down Waterworks for effecting the same object, and that the words of the enacting provisions of the Act must be controlled by the preamble, unless those words distinctly and without any doubt went beyond the preamble; and the learned counsel cited the language of Lord *Blackburn* in the *overseers of Westham v. Isles*, 8 App. c. 388. That learned judge said: "I quite agree with the argument that, in construing an Act of Parliament, where the intention of the Legislature is declared by the preamble we are to give effect to that preamble to this extent—namely, that it shows us what the Legislature are intending; and if the words of the enactment have a meaning which does not go beyond that preamble, or which may come up to the preamble, in either case we prefer that meaning to one showing an intention of the Legislature which would not answer the purposes of the preamble, or which would go beyond them. To that extent only is the preamble material." That, no doubt, is a very sound canon of construction, as it is a very old one. The preamble of a statute shows the reason for the enactment, but it does not necessarily control it. And although in the present case the preamble might show, as it certainly does show, that the Act was passed because certain petitioners suggested to the Legislature that *Cole's Cave* spring would be utilised to supply the want alleged, the enactment might nevertheless contain words distinctly going beyond the preamble; and the question in the present case is, whether the words of the enactment do, or do not go beyond the preamble. It has been uniformly laid down by the judges that the enacting words of a statute are not necessarily to be limited or controlled by the words of the preamble, for that in many instances those words go beyond the preamble. In the case *Salkeld v. Johnson*, 2 Exch., 283, which came before the Court of Exchequer on a special case from the Court of Chancery very much, it was contended, turned upon the preamble of the Act. Chief Baron *Pollock*, in delivering judgment, laid it down that the legal rules for the interpretation of statutes required that the words of the statute itself are to be read in their ordinary sense, and only modified or altered to avoid some manifest absurdity or incongruity, but no farther. And with regard to the preamble of an Act, the learned judge said, "the preamble is undoubtedly a part of the Act and may be used to explain it." "It is, indeed," he continued "as Lord *Coke*

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says, 4 Inst. 330, the key to open the meaning of the makers of the Act." "But," proceeded the learned Chief Baron, "on the other hand, though it may explain, it cannot control the enacting part, which may and often does go beyond the preamble." The learned judge further laid it down "that, even where the enacting part of an Act cannot be reconciled with the preamble, if the enacting part is clear, it cannot be controlled by the preamble." The test in the present instance, therefore, is this—can the enacting parts of Act 485 be reconciled with the preamble? And if they cannot, are those enacting parts so clear that they ought not to be controlled by the preamble? The preamble recites that the petitioners had stated that the labouring population and plantation live stock suffered from "scarcity of water," and that the petitioners had applied to the Bridgetown Waterworks Company to supply them with water from the "springs" of *Cole's Cave*, which supplied wholesome water, and that the company were willing to lay a plan before the shareholders for supplying water from *Cole's Cave*, provided the Legislature would pass an Act giving them a preferential claim on plantations for water supplied. The preamble continued in effect that, appreciating the grounds set out in the petition, the Legislature deemed it expedient to pass an Act granting to the said Bridgetown Waterworks Company, or any other Waterworks Company that may be hereafter established, the "powers" prayed for. Now, what were those "powers?" Manifestly, to supply water to plantations and similar places from *Cole's Cave* upon the terms prayed for. But it is to be noted that in the preamble these "powers" are proposed to be conferred, not alone upon the existing Waterworks Company mentioned in the petition, but upon "any other Waterworks Company that might be established after the passing of the Act"; so that the powers dealt with in the recital in the preamble were confined to the "springs" of *Cole's Cave*. But, coming to the enacting part of the Act, the first clause provides that, whenever any contract shall be, after the passing of the Act, entered into between the Bridgetown Company or any other Waterworks Company to be thereafter established, with any person or persons whomsoever for a supply of "water,"—be it noted, not water from *Cole's Cave* springs, but generally for a supply of water for the use of any sugar work plantation, &c.,—the rates agreed upon for the supply of such water shall be recovered in a summary manner as in the case of servants' wages. The words of the enactment are clear and manifestly go beyond the preamble, because the preamble relates to the "springs" of *Cole's Cave* whereas the enactment part authorizes "a supply of water" from *Cole's Cave* or from any other source, and by the Bridgetown Waterworks Company or any other Company. And besides this, we have the 4th section of the Act giving the Bridgetown Company or any other Company all the powers contained in the Bridgetown Waterworks Company's Act "for purchasing lands and streams and laying down works" in furtherance of the policy and intention of the Act, which was passed to encourage and support, at any rate, the supplying of water for the use

of plantations, in the interests of the labouring population and for the good of live stock. Mr. *Goodman*, in behalf of the Company, made the point,—and it is a very important one as showing the intention of the Legislature upon the true construction of the Act,—that, whereas in the preamble the word “springs” is used in connection with *Cole’s Cave*, in the 4th section power is given to purchase “streams” for furthering the object of the Act. Now, it is a rule of construction that where the words of a statute referring to the same subject-matter are changed, the meaning is changed, and it seems to me that the use of the word “streams,” manifestly in contradistinction to “springs” makes it clear that the Act was passed to empower any company whatsoever to obtain water from any and all sources, for supplying sugar-work plantations and other similar places.

The next point raised by the learned counsel for the appellant is, that, even supposing the court held that the scope of the act was not limited to *Cole’s Cave*, but that other sources may be tapped, that the water to be supplied under the Act must be by means of new waterworks and not by works subsisting at the date of the passing of the Act; and the learned counsel referred to the title of the Act which is to “encourage the laying down of waterworks in the several parishes of this Island.” The Company’s Act, he says, No. 315, confined the company to Bridgetown, therefore he contends they could not supply the country districts with water through the agency of their subsisting Act without special power, as was conferred upon the company by Act No. 375 to enable them to extend their water works to St. Ann’s Garrison, and also by Act No. 383 authorising the extension of their water works to the limit of a mile from the termini of the company’s pipe. The objection is ingenious—was well sustained, and is highly technical; but I do not propose to protract this judgment by dealing with it at any length. I shall dispose of it by simply observing that of course if the Bridgetown Waterworks Company desired to extend their works under the Act beyond Bridgetown, for supplying the same class of customers, they must get special powers. It could not be done under the Bridgetown Waterworks Act, because that confines their operation to the householders of Bridgetown, nor yet by the authority of the act under which the case now before the court turns, because the latter is an Act specially passed for empowering any Waterworks Company whatever to supply sugar-work plantations with water. The Act covers all supplies of water to sugar-work plantations, but it would not cover a supply to St. Ann’s Garrison or to Hastings’ Village.

A much stronger position is that taken up by the learned counsel when he objects that the Act 485 under which the complaint was brought is virtually repealed by The Water Supply Act 1886. Mr. *Clarke* contends that the Water Supply Act, looking at the preamble of the Act and regarding its provisions, and comparing both these with the preamble of the Act 485 covers the selfsame ground. Therefore that the two Acts cannot stand together and that the latter Act virtually repeals the earlier. The learned counsel cited *Daw v. Metropolitan Board*

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of Works, 31. L.J., C. P. 223. In that case, the Commissioners of sewers for the city of London by the 11th and 12 Vict. c. 163, had exercised the power which the Act gave them to name streets and number houses within the city of London, but the selfsame power was conferred under an Act of the 19th Vict., c. 120 upon the Metropolitan Board of Works. Here the entire ground was manifestly covered by the latter Act. The court said: "Here are two Acts of Parliament dealing with the same subject matter. The same power is given by the latter Act to body 'B,' as was given by the former Act to body 'A.' That creates an inconsistency, and has the effect of repealing *pro tanto* the power conferred upon body 'A.'" That is clear enough; but in the present case the point is—whether the same, and as extensive power within the selfsame limits, covering the selfsame ground, is conferred upon the Water Supply Company, as Act 485, conferred upon any company that might supply water to sugar work plantations in any part of the country. Because it is not enough that the Water Supply Company should be empowered to make contracts with persons, owners of plantations and others, to supply water, and for them to be empowered to appropriate streams; but the question is—whether the Act excludes all other companies from entering into similar contracts, and from acquiring any springs or streams of water whatsoever throughout the country. It is not only a clear but an elementary rule that a prior statute shall give place to a later, provided the intention of the Legislature to repeal the previous statute be expressed in clear and unambiguous language, and be not merely left to be inferred from the subsequent statute. A former statute will not be repealed by a later one unless the later expressly negative the former, or unless the provisions of the two statutes are manifestly repugnant; and, moreover, implied repeals are not favoured by the law.

It must be conceded that the preamble of the Water Supply Act, 1886, is substantially the same as that of the Act 485, and the Legislature profess to confer certain powers, privileges and immunities upon the Water Supply Company to enable them to provide the rural districts with pure and wholesome water in consideration of a guarantee of £5,000 a year. In consideration of that guarantee, the company are required to lay down pipes within the limits described on their plan which are to be fully supplied with water capable of delivering at least two million gallons in any one day for the domestic use of the inhabitants in the rural parishes within the prescribed limits, and the company must provide within the said limits at least 400 standpipes (secs. 108, 109, & 110.) The company are not given unlimited and absolute authority over the entire area of the country to exercise the powers conferred upon them without any limitations or restrictions, and at their own discretion. It is true, as Mr. *Clarke* argues, that under section 11 the company are given large powers to appropriate springs, streams, or water, but they must be such as are delineated upon their plan. After the company have taken any streams or waters embraced in their plan, they cannot be interfered with further than to be required to pay such compen-

sation as the Act prescribes. But before the company can take and appropriate any streams which they are authorized to take or abstract they must give notice of their intention to do so, and the company cannot deviate very substantially from the route or area described on their plan. So I take it, that any other company may go on side by side with the Water Supply Company, so far as plantations and other similar places are concerned, provided it does not interfere with the streams or lands which the Water Supply Company are authorized to purchase or abstract, and which shall have been distinctly embraced in their plan and referred to in their book of reference. The guarantee is given to the company to secure the objects set out in the preamble and which are provided for in the three sections (108, 109, and 110,) I have already referred to. But to encourage the Water Supply Company and make it worth their while to fall in with the views of the Legislature, they are empowered to make contracts with owners of houses or plantations for supplying water for domestic and other purposes at such rates and in such manner as may be agreed upon, as they may also do for supplying water for baths, ponds for irrigation, and for other purposes within the area prescribed on their plan. But this power is merely permissive. The Act says the company shall be "at liberty" to make the contracts and do the things I have referred to. But there is nothing in the Act, to my reading, to exclude other persons or companies who do not trespass upon the Water Supply Company's statutory preserves or interfere with the rights, privileges and immunities conferred upon them, from supplying water, for plantation uses, in any district in any part of the Island. The Act 485 is not in terms repealed in the Water Supply Act; and, far from the Bridgetown Waterworks Company or any other Waterworks Company being excluded by that Act from supplying water under contract or arrangement with sugar-work plantations and other similar places in any part of the Island, section 136 distinctly enacts that "Nothing herein contained shall be deemed, construed, or taken to alter, take away, or abridge, or in any manner interfere with the rights, powers, and authorities, provisions, penalties, forfeitures, matters and things heretofore granted by any Act or Acts of the Legislature of this Island, to any bodies corporate or any other person or persons whatsoever," I am therefore against the counsel for the appellant upon the point I have been dealing with.

The learned Counsel's last contention was that, in any event, the respondents in error cannot recover judgment as in the case of servants' wages in respect of the amount claimed for the use of the meter. Mr. Goodman for the company contends that his clients can recover under the authority of section 2 of the Act 485. I do not concur in that contention. If it was the intention of the Legislature that any company supplying water for plantation uses should recover for the use of the meter in the same way as upon any contract for the supply of water, the provision would have been embodied in section 1 of the Act. The respondent company must be left to recover the amount claimed for the use of the meter in any way that they may be advised,

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but they cannot recover under the Act No. 485, on the authority of which the present complaint is brought.

In the result, I concur substantially in the grounds on which the court below confirmed the decision of the police magistrate; and affirm their decision. But, for the reasons I have stated, I must vary that decision by ordering that judgment, to be recovered as in the case of servants' wages, be entered for the respondents in error for the sum of £8 10. 6. At the same time, as the respondents have succeeded in their main contention, I order that the appellant pay the costs, of this appeal and those also of the court below.

LYTE vs. BROWN.

(*In Error* Friday Nov. 19th 1892.)

His Honour Sir CONRAD REEVES, Kt., C.J.

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Mr. G. A. Goodman Counsel for the appellant. The respondent appeared in person.

THIS was an appeal to the Court of Error against the decision arrived at by the judges of the Assistant Court of Appeal, in the exercise of its appellate jurisdiction reversing a decision of Mr. police magistrate Thorne, of District "C," on the complaint of the respondent (in this court) against the appellant for the larceny of a wheel and axle belonging to the *Grove* plantation, value 40/, the material facts being that in February last the wheel and axle were lost and the wheel was found on the 25th July on the premises of the appellant.

Mr. Goodman submitted that the conviction of the Court of Appeal ought to be quashed on the ground that neither that court nor the police magistrate had jurisdiction to entertain the complaint and dispose of it summarily. The information which was preferred against the defendant was for the larceny of one truck wheel and axle alleged in the information to be of the value of £2. A police magistrate had jurisdiction in cases of larceny of chattels, if it be proved that the value of the chattels was 20/ or any sum under 20/, [*Vide* section 8 (1) of "The Police Magistrates' Act 1891"]. A police magistrate also had jurisdiction in cases of larceny of chattels if it be proved that the chattels were worth any sum over 20/, and under 40/, and if the defendant consented to the police magistrate's hearing the case summarily; or to put it correctly a police magistrate had jurisdiction in cases of larceny other than those mentioned in section 8 if the conditions precedent to be found in section 17 of "The Police Magistrates' Act, 1891" be complied with. From section 17 it would be gathered that the conditions precedent to the assumption of jurisdiction on the part of the police magistrate were—(1) proof that the value of the articles, the subject of the complaint was something between 20/ and 40/: (2) Question to be put to defendant as to the mode of trial desired by him; (3

consent of defendant to the case being disposed of summarily. (4) recording on proceedings consent of defendant. Had these conditions precedent been complied with in this case? With regards to (1) not even an attempt was made before the police magistrate to prove the value of the wheel and axle. The first and all-important condition then, without which a magistrate could have no jurisdiction in any case of larceny of chattels had not been fulfilled. With regard to (2), there was nothing on the face of the proceedings or anything else to show that the question set out in section 17, or a question to the like effect was put to the defendant. With regard to (3) and (4), it was to be observed that the magistrate noted on the first page of the deposition papers before any of the witnesses were called and examined, that "the defendant consents to the case being tried summarily." Now, the consent of the defendant would only, in accordance with section 17, be given after the value of the articles alleged to have been stolen had been proved, and after the question as to the mode of trial had been put to the defendant. The magistrate, therefore, had not complied with the regulations prescribed by statute. Summary jurisdiction was created by statute and all summary proceedings must be strictly conformable to the regulations prescribed by the special law in each instance. "This," as *Paley* at p. 16 said, "is the first requisite, the absence of which by no means can be cured." Again, the consent ought to have been recorded on the conviction. The section directed that "the magistrate shall record on the face of the proceedings such consent by the person charged." The word "proceedings," if reference be made to *Paley*, meant conviction. Under section 34 (1) of "The Police Magistrates' Act, 1891" "conviction" meant "an entry of the particulars of the case, and the substance of the decision thereon in a book to be kept according to form 'D' after such entry had been signed by the magistrate." The consent therefore of the defendant ought to be recorded on the entry made in book 'D.' That had not been done. And if any one of the conditions precedent be absent, the magistrate had no jurisdiction. He had attempted to show that none of the conditions were present. At all events, it was beyond the region of doubt that the first and chief condition was not present. That being so, the magistrate had no jurisdiction. If the magistrate had no jurisdiction, it was clear that the Court of Appeal could have none [Vide section 34 of "The Assistant Court of Appeal Act 1891."] But, apart from that, suppose it had been proved before the Court of Appeal that the value of the articles—the subject of the charge—exceeded 20/ but did not exceed 40/, would the court have, or could the court give itself jurisdiction? Certainly not, for the simple reason that the Court of Appeal could not put the question contained in section 17 of the police magistrate's Act and obtain the consent of the defendant. But what was proved before the Court of Appeal? It was proved that the value of the wheel,—one of the articles alleged to have been stolen,—was 40/. It was manifest that if the value of the wheel was 40/, the value

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of the wheel and axle was more than 40/. Now, if the value of the articles alleged to have been stolen exceeded 40/. no Inferior Court could have jurisdiction, no matter how much the defendant may have desired the court to try and determine the case. It was true that the Court of Appeal eliminated the word "axle" from the complaint immediately before convicting the defendant; but surely that could make no difference, because the question was not what was the value of the articles the defendant was convicted of stealing—but what was the value of the articles the defendant was charged with stealing. Again, the Court of Appeal could not amend the complaint to give itself jurisdiction. But, assuming that the courts below had jurisdiction, he submitted that no case had been made out calling upon the defendant to account for the possession of the articles alleged to have been stolen. The material facts were, that in February a wheel and axle belonging to the *Grove* plantation were lost and that the wheel was found on the 25th July on the premises of the defendant; that was to say, five months after the loss of the articles alleged to have been stolen, one of the articles was found on the premises of the defendant. That being so, he contended that there was no such recent possession as to raise the presumption of larceny, and that the court ought to have directed an acquittal in accordance with the ruling of *Park J.* and *Maule J.* in the cases of *Reg. v. Adams*, 3 C. & P. 600, and *Reg. v. Cooper*, 3 C. & K. 318.

HIS HONOUR, in giving judgment, said that in this case Counsel for the appellant had argued that the decision of the Assistant Court of Appeal should be reversed, firstly, because no case had been made out at the hearing calling upon the appellant to account for the possession of the wheel and axle, and he would dispose of that point at once. It was proved by the witness *Atwell* that the wheel was last seen at the *Grove* plantation on the 15th February last, where it was left in the possession of the carter. It was found five months after; that was to say, in the month of July, in the possession of the appellant. The carter was not called at the hearing to prove how the wheel had got out of his possession—whether it was stolen from him or he had sold it, and, therefore, the learned Counsel argued that the appellant might have come by it honestly, and in the absence of evidence of the taking, the case should have been dismissed. He (the Judge) thought that the man in whose possession the wheel was left ought to have been called, because there ought to be some evidence of the loss of the property. In a case where a prisoner in whose possession a horse was found, was charged with the larceny of it and the person with whom the horse had been left to be agisted was not called, the Judge, *Gurney B.*, said that it was perfectly consistent with the evidence that the horse might have got out of the person's possession in some way not felonious. [*Yend's Case*, 6 C. and P. 176.] The next point taken by Counsel was that there was here no such recent possession as raised the presumption of larceny, for five months had elapsed between the date of the wheel being left at the *Grove* and the date it was found at the prisoner's house, and that the

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rule of law was that after such a lapse of time, where nothing is proved but the finding of the goods, the accused was not required to account for the possession. It was true that many Judges had so ruled in cases like the one before the court, and one of the latest was *Reg. v. Harris*, 8 Coz, where prisoner was indicted for sheep-stealing. The sheep was lost in September and found in the prisoner's house in March following. There was no evidence of the taking, and the only evidence of guilty knowledge was some contradictory statements made by the prisoner when the sheep was found. *Channell B.* said: "That upon such evidence he would not be justified in sending the case to the jury because the interval between the loss and the finding was too long to require the prisoner to account for the possession." But it was not correct to say that that was an established rule, for in a case where the only evidence against the prisoner was that a sheep was found in his house three months after the loss and his Counsel relied upon the rule in question, citing *Ree v. Adams*, 3 C. and P. 600, *Wighthman* held that the case must go to the Jury, as there was no definite rule as to the precise time which was too great to call upon a prisoner in whose possession property was found, to account for such possession. The Judges of the Assistant Court of Appeal were the sole judges of the evidence adduced before them, having the right to draw any inference from that evidence; and they had decided that the evidence was sufficient to call upon the appellant to answer and account for the possession. If therefore the case had turned solely upon the two points referred to, he (the Judge) could not have reversed their decision, even if he had concurred in the ruling of *Channell B.* and *Gurney B.*, in the two cases he had referred to. The learned Counsel had argued, in the next place, that the decision should be reversed because neither the police magistrate nor the Assistant Court of Appeal had jurisdiction to hear the case. On that point he was entirely with the learned Counsel. Police magistrates and justices of the peace could have no jurisdiction except that given them by statute; and, of course, their first duty in hearing a case was, before deciding to comply with the statute and give themselves jurisdiction. Formerly the law relating to petty larceny was that the magistrate had jurisdiction only in cases where it was proved before him that the articles stolen was not worth more than 20/. In 1882, it was thought advisable to extend this jurisdiction so as to enable magistrates to try and determine summarily, cases of larceny where the value of the goods stolen was beyond 20/. and not beyond 40/. and the Act laid down in terms that before the magistrate should have jurisdiction to try and determine such cases, it must be proved to his satisfaction, that the value of the chattel did not exceed 40/. Upon that being proved, then and only then was he required to put to the defendant a question to the following effect: "Do you consent to my trying and disposing of the case summarily, or do you prefer to be sent to the court of Grand Sessions to be tried there?" If the defendant consented to be tried summarily, the magistrate must record the fact upon the proceedings and then proceed to hear the case, and determine it.

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In the case before the court, Mr. Browne brought a complaint against the appellant for the larceny of a wheel and axle, alleging in the complaint that the value was 40/. The magistrate proceeded to hear the case; but neither Mr. Browne nor his witnesses proved the value of the wheel and axle. In fact, there was no evidence at all of value adduced before the magistrate, therefore he could have no jurisdiction to try "and determine." And if the magistrate had no jurisdiction, clearly the Assistant Court of Appeal could have none. However, the case went to the Assistant Court of Appeal, and on the hearing in that Court the value of the wheel alone was proved in evidence before them to be 40/ plus the axle. Now, proving the value before the Court of Appeal could not cure the defect of want of jurisdiction, because the law required that the value of the article stolen must be proved before the police magistrate—not the Assistant Court of Appeal. It was true, said His Honour, that the magistrate recorded upon his proceedings that the defendant had consented to the case being tried summarily. But it was an elementary principle that where a justice of the peace did not take the course prescribed by the statute to originate jurisdiction he could not acquire it merely because the parties consented to his exercising it. Under the circumstances, since the proceedings show no jurisdiction in the magistrate to hear and determine the complaint, the court must quash the conviction.

Mr. Goodman asked for costs.

His Honour said that he should make no order with regard to costs.

The court adjourned to Friday next 25th instant.

LAWRANCE v. FIELD.

(In Error, November 19th, 1892.)

His Honour Sir CONRAD REEVES, Kt., C.J.)

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In this case the Magistrate (Mr. Seon) dismissed a complaint against the respondent for obstructing the highway with barrels and bags of merchandize contrary to the 22nd section of the Highways' Act. Against this decision, appellant appealed to the Assistant Court of Appeal, who confirmed the magistrate's decision. Thereupon, he appealed to the Court of Error.

The *Solicitor General*, who appeared in support of the appeal argued at great length and with much ingenuity, that the court was bound to reverse the decision of the court below. The first contention of the learned counsel was that it was the general policy of the law to keep the highways clear of any obstruction whatsoever, that the clause relied upon by the appellant was passed to carry out that policy to the fullest extent, and that the true rule of construction was to read the provisions of an Act so as to collect from them the intention of the Legislature in passing it, and in any event to carry out that intention, even though

in doing so minor and technical rules of construction should be over-ridden. The learned counsel contended, in the next place, that the canon of construction relied upon by the Assistant Court of Appeal, although sound enough, did not apply in the present instance. The canon was, that if particular words were specifically set out in an Act, general words, such as "any other matter or thing whatsoever," following the particular words, were to be construed as *ejusdem generis* with the particular words. But this only applied where the particular words constituted one genus,—that was, were things of the same nature or character. Where the particular words were each of a different genus, as was the case with the particular words set out in the clause, such as timber, manure, ashes, soil and rubbish, the rule did not apply, and the general words were to be construed according to their natural construction. Inasmuch, therefore, as the highways were to be kept clear of obstruction of any kind, the defendant was liable because he had in fact obstructed the highway by putting his merchandize upon it. The learned counsel cited several cases in support of his contention.

The respondent did not appear by counsel, and at the close of the *Solicitor General's* argument, His Honour said he would put his decision in writing and deliver it on the following Friday.

Friday, November 25th.

The CHIEF JUSTICE delivered his judgment to-day as follows:—

This case comes in appeal from the decision and judgment of the Assistant Court of Appeal under the circumstances which I proceed to detail. A complaint was brought in the police magistrate's court, Bridgetown, by the appellant, in behalf of the public, against the respondent, a dealer in American bread-stuffs, carrying on his business in Roebuck Street, Bridgetown, for breach of the provisions of the Highways' Act; and the substance of the complaint was—that "the defendant did, on 16th July 1892, at Bridgetown, wilfully place a quantity of things—to wit, rice and barrels of peas, upon Roebuck Street, a highway." The words of the complaint pointed to section 23 of the Highways' Act 1891, and the complainant in the court below appellant in this court, relied upon that section and the interpretation clause, section 2, which makes streets, lanes and alleys highways. The evidence disclosed that, on the day in question, certain packages of merchantable peas and rice were laid out in rows before the respondent's premises, near to the footpath, and remained there for some hours. The facts proved in evidence, so far as the depositing of the goods on the street was concerned, were not seriously contested by the respondent, and the magistrate in the end dismissed the complaint on the merits. An appeal was brought into the Assistant Court of Appeal by the present appellant, and that court, at the hearing, substantially confirmed the decision of the court below, on the ground, as I understand it, that the articles proved to be placed on the highway did not come within the meaning and intention of the Act, or the particular clause relied upon, because that clause, from its

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framework, pointed at obstructions caused by the depositing of particular things on the street, such as timber, stone, trash, manure, soil, ashes and rubbish; and that the general words, "or other matter or thing whatsoever," following the specific words, must be construed as meaning things of the same kind, nature and character as the things enumerated included. And the court relied upon and cited the well known canon of construction, that the general words following particular ones must be construed *ejusdem generis* with those specifically named in the preceding sentence. The court, in its judgment, says: "It is clear from the reading of the section that the object of it is to prevent persons from wilfully placing anything whatever upon a highway which might obstruct or prevent the free and safe use of it by all persons having the undoubted right to use the same." This seems to be the aim of the section; first, from the words following: "It shall be lawful for the Commissioners, &c., to cause the said highway to be cleared, by removing or disposing of such matter or thing," and next from the proviso at the end of the section, "Nothing in this section contained shall extend to prevent stones or other materials being placed on the highway for the repair of the same." If this be so then the various articles specifically mentioned in the early part of this section, viz., timber, stone, trash, manure, soil, ashes rubbish, constitute one genus, viz., articles possessing the common characteristics of causing an obstruction to the free use of the highway; and therefore, according to the well-known rule of interpretation, "other matter or thing whatsoever," "immediately following must be *ejusdem generis* with those various articles specifically mentioned before; that is, must be some matter or thing upon a highway obstructing or interfering with its free use." The *Solicitor General*, who appeared in support of the appeal to this court, contended, with some force, that the decision of the court below is wrong, that they had misconceived the scope of the canon of construction that they had relied upon, and, moreover, that that canon was to be subordinated to the wider rule that, in construing an Act of Parliament, the object was to ascertain, from the entire enactment, what was the intent of the legislature in passing it, and to give effect to that intention in any event. And with regard to the *ejusdem generis* doctrine, the learned counsel contended that that applied only when all the things enumerated were of a common genus, and not where they implied a multitude of different genera, as was the case here, when we came to look at the particular words, "timber, stone, trash, manure, soil and ashes," which could not be considered as forming one genus. The learned counsel cited several cases in support of his contention. He says the policy of the Highways' Act on the particular point before the court is the common law policy of keeping the highways free for the passage of the public, as was laid down in *Russell's case*, 6 *East*; consequently, anything which impeded that free passage was unlawful, and that it was the intention of the legislature of this colony to effectuate that policy by the provisions of section XXIII, of the Highways' Act. There is no doubt that the true

rule of construction is—to examine all the provisions of an Act to ascertain the intention of the legislature, and to give effect to that intention. But in doing so, care must be taken to avoid legislating, and to construe the Act upon the language and limitations of its provisions. Applying the rule as I have just laid it down, subject to the limitations mentioned, let us ascertain what is the reasonable construction to be put upon the section in question. That particular section is comprised in Part II, of the Act, headed “Prevention of obstruction and accidents;” and I may mention at this point that the *Solicitor General* drew the attention of the court, in this connection, to an observation of Lord *Chelmsford* on the hearing, in the House of Lords, of the appeal in the case of the *Hammersmith Railway Company v. Brand*, 4 H. L. cases, 203, where the learned Lord made the point “that the sections of the Act were arranged in order, under different heads, which indicated the general object of the provisions immediately following, and were to be referred to in order to determine the sense of any doubtful expression in a section ranged under a particular heading.” Now, the following are the words of section XXIII:—

“If any person shall wilfully place timber, stone, trash, manure, soil, ashes, rubbish or other matter or thing whatsoever upon the highway, the person so offending shall incur a penalty not exceeding two pounds; and it shall be lawful for the Commissioners, Inspector, Superintendent, or other person entrusted with the care of the roads of the parish, to cause the said highway to be cleared, by removing or disposing of such matter or thing, and to apply the proceeds thereof, first in defraying the cause of such removal, and to pay the residue into the public treasury for the use of the parish.”

It is to be observed that this section points to obstruction of the highways in a particular way; that is, by wilfully placing timber, stone, trash, ashes, rubbish, “or other matter or thing whatsoever,” upon the highway. If the object was to prevent obstruction by any means whatever it is difficult to see why the several things should have been specified in the clause when all doubt and confusion would have been obviated by simply enacting that the wilful placing or disposing of any matter or thing whatsoever on the highways was an offence, punishable in the manner stated. And it is to be remarked that the clause empowers the Commissioners, or their servants, whenever any such obstruction is caused by any of the things mentioned, or any other matter or thing being placed on the highway, to clear the said highway; and the things themselves are *ipso facto* confiscated, and may be sold to defray the expenses of removing them. In a remarkable case, *Lindon v. Standbridge*, 26 L. J. Ex. 388, Commissioners of Highways in Birmingham were required under an Act of Parliament to remove and carry away from the houses and tenements of the inhabitants of the town all dust, ashes and rubbish; and the point before the court was, whether, under those large and plain words, the Commissioners were not compellable to remove dust, ashes and rubbish from manufac-

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tories—there being no question that manufactories came within the legal meaning of the words houses and tenements. Barons *Bramwell* and *Martin* confessed that there was great difficulty in construing the Act, and that they had great doubts; but, in the result, the court decided that manufactories did not come within the meaning of the Act, and that it was not the intention of the Legislature, in framing it, that the Commissioners were to be compellable to remove dust and ashes which were the exclusive produce of manufactories, although manufactories were of course houses and tenements. That the intention to be collected from the language employed and the entire scope of the enactment was to remove dust and ashes from domestic houses only. Chief Baron *Pollock* said in the course of his judgment: "It appears to me the judgment we ought to give in construing this Act of Parliament is to be arrived at by putting that reasonable construction upon it which the courts are constantly called upon to do in construing Acts of Parliament." And *Bramwell* B. remarked: "We ought to be reluctant to put a qualification on the words of Acts of Parliament, and to say the words used mean something they do not express. But, I suppose it must be done, and the necessity arises for it every day." I quote these doctrines, laid down by such eminent judges, to show the difficulty which often arises in construing an Act of Parliament so as to arrive at the intention of the Legislature in passing it. The same difficulty, it will be obvious, does not arise in a case at common law. Hence in *Russell's* case, cited by the *Solicitor General* from *East*, it was easy for the learned Judge to lay down the law as he did with regard to obstructions on highways. That was an indictment for nuisance at common law, where the defendant, a waggoner occupied one side of a public street before his warehouse in loading and unloading his waggons for several hours. The court held that it was a nuisance because the primary object of the street was for the free passage of the public, and it was no answer to say that the defendant could not help himself. The court remarked that if the nature of the defendant's business was such as to require the loading and unloading of so many waggons, he must either enlarge his premises, or remove his business to some more convenient spot. The same thing might be said if the present respondent were indicted at common law for a nuisance. But he is not. He is complained upon under a special clause of the Highways' Act; and the point is—whether the obstruction he caused by placing his barrels of meal, corn, and rice before his warehouse, but on the highways, comes within the meaning and the language of the clause. Now, the words of the clause distinctly point to obstructions caused by depositing timber, trash, manure, ashes, and rubbish on the roadside—which articles, so placed, are at once forfeited. I do not think it would be a reasonable construction to hold that bags of rice, barrels of peas, and such like merchantable commodities, are intended to be included in the class to which the things specified belong, such as trash, manure, and ashes, and which might be lawfully seized at once, as they are deposited on the highway in front of a merchant's warehouse by the com-

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missioners, and confiscated. The section could scarcely mean this but it must mean it, and that the legislature intended this in passing the Act, monstrous though it seems, if the *Solicitor General's* argument is sound and capable of holding its ground. It would be a different matter if the peas and rice were unmerchable and unfit for food, because in that case they would be refuse matter as much so as stone, ashes, soil &c. Without pursuing that branch of the argument any further, let me now deal with the learned counsel's argument, that the doctrine *ejusdem generis* does not apply because the different articles enumerated in the section are as he says, of different genera; and, of course I concede to him that the canon applies only where the particular words constitute one genus—that is, particular things impressed with a common character. Let us try the case by this test. The *Solicitor General* says on the authority of Lord *Chelmsford*, as I have already noticed that we must look at the different heads under which the sections of the Act are arranged if the meaning be doubtful. Section XXIII is in that part of the Act relating to obstructions; and we find the head note of the very section on which the case turns to be "heaping rubbish." Now, it seems to me *prima facie* on reading this head note, that the legislature intended to classify timber, trash, manure, soil, and ashes under one head, that is, the head of "rubbish." And there can be no doubt that the legislature had full power if it thought fit, to make the several items constitute one genus, that is, the genus rubbish; and if they did so, there would be an end of the argument about different genera. I think all these specific things—timber, stone, trash, manure, &c., are impressed by the legislature itself in the head note of the clause with the common character of rubbish. Genus is defined to be an assemblage of species possessing a character in common, by which they are distinguished from all other species. Now, what is rubbish? Rubbish is defined to be things that are worthless, a mass or heap of good-for-nothing things. That is what the timber, stone, trash, manure, soil, and ashes mentioned in the clause consist of—worthless material—rubbish heaped on the road and obstructing it. Can it be said that barrels of peas and bags of rice, just brought into the market and being stored by a trader, are *ejusdem generis* with the rubbish indicated by the head note, and by the particulars words set out in the section? This argument of mine is supported by the case of *Reg. vs Dickson*, 26 L. J., M. C. 204. That was a case stated for the opinion of the Queen's Bench and it arose on the construction to be put upon a bye-law to prevent obstruction of the highway, made by a town Corporation under the authority of the Act 5 & 6 W. 4 c. 76, sec. 90 referred to by the *Solicitor General*, in the course of his argument. The defendant there was summoned before justices and convicted for obstructing a highway in the borough by erecting a wooden frame or shop front projecting upon the highway. The bye-law which I am sorry to say, I have not got in the case imposed penalties for obstructing the streets by placing upon them various things all of which were of a "temporary and moveable" character and continued; "or shall cause any other obstruction, nuisance or

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annoyance. The defendant had built up the area in front of his house. This was a substantial building although of wood and extended an inch and a half over the foot way ; and the question—was whether this was an obstruction within the meaning of the bye-laws. The facts were admitted and the court held that inasmuch as all the methods of obstruction mentioned in the bye-law related to things all temporary and movable in their character, they constituted the genus “temporary” as contradistinguished from the genus “permanent” and as the obstruction proved by the evidence was of a permanent nature, the general words following the particular would not include anything of a permanent nature. The *Solicitor General* cited the case of *Reg. v. Payne*, 35 L.J., M.C., 170., where the Act said “that every person who, with intent to facilitate the escape of a prisoner, conveys into a prison any mask, dress or any other disguise, or any letter or any other article or thing shall be guilty of felony. “The prisoner here had conveyed into the prison a crowbar, and the point raised by his counsel was that the crowbar was not *ejusdem generis* with the things enumerated, and would not come within the general words, “article or thing,” and therefore the prisoner could not be convicted. *Byles* Justice said, as the *Solicitor General* in his argument in this case maintained, that the articles enumerated belonged to different genera and therefore that the canon of construction relied upon did not apply. But there the legislature had not impressed upon the objects enumerated a common character. Moreover, the judges were to ascertain the intention of the legislature; and *Pollock*, C.B., said that the general words at the end—“any other article or thing,” meant a thing of any other sort or description, “because,” said the learned Baron, “all the prior statutes on the subject since the 16th George II, included a crowbar.” So that it seems to me the conviction was upheld by the court above, not so much because the particular words were of different genera, but because the court felt that, whatever words were employed in the clause, the intention of the act was to punish and put down any sort of attempt to assist prison escape. In *Dickson v. Doubleday*, 30 L.J., M.C. 90, also relied upon by the learned counsel, the Act enabled a committee appointed for certain purposes to “require overseers of the poor, constables, assessors, and any other persons whomsoever, to attend before them and produce certain papers and things in their custody.” A private person having been summoned, it was objected that a private person was not and could not be *ejusdem generis* with overseers of the poor, constables and assessors,” because these latter were public officers. The court did not say that the canon of construction was not good and subsisting: they said it did not apply in that case. Nor did they say that “private person” was, on the ordinary construction of an Act, to be comprehended in the particular class or genus indicated by the particular words. They said that on comparing sections 5 and 7 of the Act together, the general words in section 7 were to be construed in their natural sense as meaning any person whatsoever; and, of course, that went upon the elementary canon that where you change

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the words in different clauses in dealing with the same matter you change the meaning. I confess that on a careful consideration of the words of section XXII of the local Highways' Act, and comparing that section with the other portions of the Act, I find no grounds whatever which would warrant me in saying that it was the intention of the legislature that the clause in question should apply to obstructions caused by merchants and traders placing their merchantable goods upon the highway in front of their premises. I am satisfied that the section applies only to things of the same nature as those enumerated and set out in the section, which are classed as constituting rubbish. Consequently only worthless and refuse matter, which merchantable peas and rice are not, will come within the true meaning of the general words "or other matter or thing whatsoever" occurring in the section. In the language of the judges of the Assistant Court of Appeal, the general words must be construed as applying to things and matters *ejusdem generis* with the particular words preceding them. It may be said that since an obstruction of the highway in fact was caused by the act of the respondent in this case, the construction put upon the statute by this and the courts below will hit ordinary persons of little standing who might incontinently heap rubbish upon the highways while merchants and tradesmen who cause equal obstruction by their merchandise being piled up on the highway will escape punishment which is one-sided and unjust. That may be so. It is not the first time that such an imputation has been cast on an act of the legislature. In the case, *Regina vs Sylvester* 33 L. J., M. C. 79., a farmer was convicted before Justices for working on the Lord's day, contrary to the provisions of 29 Car. 2 c. 7, sec 1 which enacts that "no tradesman, artificer, workman, labourer, or other person whatsoever shall exercise any wordly labour or business of his ordinary calling upon the Lord's day." The proceedings were brought by *certiorari* into the Queen's Bench, and the question was whether a farmer was included in the general words "or other person whatsoever" the word farmer not being specifically mentioned. It was argued, with considerable point and cogency, in support of the conviction, that the intention of the legislature manifestly was to put down the following of one's occupation on the sabbath, and therefore any person whatsoever following his occupation on the sabbath day was brought within the penal provision of the Act. The court held that a farmer was not *ejusdem generis* with tradesmen, artificers, workmen and labourers and could not be included in that class under the general words, "other person whatsoever" "This construction" said Lord Chief Justice Cockburn "may be open to the inconvenience and scandal adverted to—that an agricultural labourer may be liable to be punished, while a farmer, who employs him and stands by or actually takes part in the work, is not liable; but we are not here to legislate but simply to interpret what the legislature has chosen to enact." For all these reasons, I feel it to be my duty to confirm the decision of the court below. But as the complaint was brought by a public officer in the interests of the public, who are entitled at common law to the free and

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unobstructed use of the highways, I shall make no order with regard to costs.

COBHAM v. BRIDGETOWN TRAMWAYS' COMPANY.

(In Error 10th February 1893)

His Honour Sir CONRAD REEVES, Kt., C. J.

THE appellant appeared in person. Mr. W. H. Greaves, Q.C., (instructed by Mr. J. W. Catford) appeared for the respondent.

The facts of the case were that the appellant, on the 24th September 1892 at 9 p.m., was on the left side of the road obliquely opposite the public market, when the tram car on its townward journey was jerked off the rails by some pieces of stone in the groove of the rail and the mules ran against the appellant causing her to lose certain articles she had in a basket and bruising her on the right thigh. The road at the place where the accident occurred was being repaired by the Commissioners, and on a previous journey on the same day the conductor had noticed stones in the groove of the rail at the very place, and had sent a servant of the company to clear it.

The Judge of the Petty Debt Court had, after taking the evidence for the appellant and respondents, decided in favour of the respondents. The appellant took the case to the court of appeal, where the decision of the Petty Debt Court was confirmed, justice Knight dissenting. Thereupon the appellant appealed to the court of Error.

The *Solicitor General*, on behalf of the respondents submitted that negligence was a question of fact, and that both the Judge of the Petty Debt Court, and the Judges of the Assistant Court of Appeal had decided that, as a matter of fact, the respondents were not guilty of negligence, and therefore the court of Error could not interfere.

The *Chief Justice* : In the interests of the public and of the tramways' company I will state my views on this case, although I am of opinion that the question before me is one of fact and not of law, and therefore that I have no jurisdiction to entertain the appeal. The facts of the case are, that on 24th September last, the tramcar ran off the rails and injured the appellant. The first question is,—did the mere fact of the car having run off the rails raise presumption of law against the respondents that they were guilty of negligence? And one of the judges, relying on a dictum of *Addison* in his work on torts to the effect that "when a train is under the exclusive control of the company, the very fact of its running off the line has been held to be *prima facie* proof of negligence on the part of such company, or its officers, and throws upon them the burden of explaining how it happened, and of showing that it occurred without any fault or neglect of duty on their part," and the case of *Carpue v. London and Brighton Railway Company*, reported in 5 Q.B. 751 is cited in support of this proposition; but

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in *Hammack v. White* 31 L.J. C.P., *Earle C. J.* says: I "entirely dissent from the doctrine that the mere happening of an accident throws upon the defendant the onus of disproving negligence," and *Willes, J.*, says: "The rule that, independently of contract, 'there must be some affirmative evidence of negligence given by 'the plaintiff in addition to the mere happening of the accident, 'has already been laid down by the Lord Chief Justice in this court in *Cotton v. Wood*." My opinion is that it lies on the plaintiff to prove affirmatively that there was negligence on the part of the defendant company. In this case the question was raised and discussed in the Court of Appeal whether there was any obligation on the company to have a man posted at such portions of the tramway as were adjacent to the highway undergoing repairs to keep the rails clear, but in my opinion that is not the material point. The material point is, that the Company, if they know that the road is undergoing repair, had the duty cast upon them in driving their tram car along the line to draw up and go as quietly as possible along the part of the road which had been repaired and where there was loose metal lying about, so as to avoid the possibility of an accident. I think that the driver of the tram car, in this case, should have drawn up and gone at a snail's pace; and if the case had come before me sitting with a jury, I should have charged the jury that, inasmuch as it was proved that loose stones had got into the grooves and had to be cleared out on the previous trip to town, whether the conductor had not had such warning as to induce him to draw up and walk his mules slowly along that part undergoing repair, and if so to determine for themselves whether it was not negligence to go over the spot at a trot. *Coleridge*, Chief Justice, in a recent case reported in the *English Times*, says, "Negligence cannot be defined: it must in all cases be left to the jury to say what is or is not negligence." Negligence is therefore a question of fact, and both the lower courts have held that, as a matter of fact, the respondents were not guilty of negligence. The Court of Error has jurisdiction to determine questions of law only; but no jurisdiction to determine questions of fact. If the power had been reserved to me to do so I would in this case have ordered a new trial because I do not agree with the verdict found by the lower courts. But I have no power to order a new trial, and if I had, the exercise of it would lead to no different result, because I would be sending the case back to be heard by the same judges who have already heard it. Or if the lower courts had non-suited the plaintiff, I could have reversed that decision because the question of non-suit is one of law, and not of fact. As the case now stands, I have no power to set aside the verdict of the Petty Debt Court and Assistant Court of Appeal, and I hold that I have no jurisdiction to entertain this appeal, and, having no jurisdiction to entertain the Appeal, I cannot make any order as to costs.

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WILLIAM EDGHILL v. A. D. BYNOE.

(*In Error, Friday September 1st 1893.*)

His Honour Sir CONRAD REEVES, Kt., C.J.

THIS was an appeal from a case heard and argued in the Assistant Court of Appeal in which the appellant, as an officer of the Customs department, charged respondent with having in his possession on the 5th November last a certain quantity of tobacco known as Puerto-Rico toms, the same being liable for duty and not entered and paid. The following are the reasons of the Assistant Court of Appeal in giving their decision by finding the defendant £20 :—

On the 21st November 1892, the appellant *Bynoe* lodged a complaint against the respondent *Edghill* under section 123, sub-section (1) and section 134, sub-section (3) of "The Trade Act 1891" for that on the 21st November 1892, at Bridgetown, a quantity of cigars liable to forfeiture into the defendant's possession did knowingly come.

Evidence was taken before the police magistrate on this complaint on the same day and the case was adjourned.

On the 22nd November 1892, the complainant lodged a similar complaint against the defendant in respect of the 7th November 1892.

On the 2nd December 1892 by arrangement between counsel for appellant and counsel for respondent the evidence taken on November 21st was read over to the witnesses and held to be applicable to both complaints. At the close of the evidence the police magistrate dismissed both complaints on the merits and the appellant gave notice of appeal against both decisions.

At the hearing before the Assistant Court of Appeal on Friday 27th 1893, it was again arranged between counsel for appellant and counsel for respondent that the evidence should be read over and the witnesses examined but once, and that any further evidence taken should be held to be applicable to both appeals. The *Solicitor General*, counsel for the appellant, intimated that he only wished for one conviction and asked that in the event of the court convicting the respondent on one complaint the decision of the police magistrate on the other should be confirmed.

The court convicted the respondent on the complaint relating to the 7th November 1892, and confirmed the police magistrate's decision on the complaint relating to the 21st November 1892.

From this conviction the respondent appealed to the Court of Error.

Under section 134 subsection (2) of "The Trade Act 1891) every person who shall assist.....in the unshipping &c.....of goods liable to forfeiture under this or any other Act of this Island relating to trade or navigation" (and under subsection (3)" or into whose hands or possession the same shall knowingly come, shall for each such offence forfeit &c.....

Thus "every person into whose possession goods liable to forfeiture shall knowingly come" is liable to the penalty imposed by section 134.

The court found that the goods in question in this case were liable to forfeiture and that they came into the respondent's possession knowingly *or with his knowledge*, but the majority of the court did not find that at the time of the goods so coming into his possession the respondent knew that the goods were liable to forfeiture.

Counsel for the respondent relied in this court on the contention that the respondent must be proved to have had a guilty knowledge that the goods were liable to forfeiture when they came into his possession before he could be convicted.

This contention practically comes to this that in extracting a meaning from the sentence "every person into whose possession goods liable to forfeiture shall knowingly come" the word "knowingly" must be held to refer to the words "goods liable to forfeiture" and not to the word "come."

Such a construction appears to this court altogether at variance with the ordinary canons of grammatical construction which the legislature are supposed to be acquainted with and to follow.

The court therefore believing that the first averment of the complaint (viz:—that the cigars were liable to the payment of duty having been unshipped before due entry and warrant granted) was proved: and that the second averment of the complaint (viz:—that such cigars came into the possession of the respondent and did knowingly come) was also proved, had no alternative but to convict the respondent.

Mr. Solicitor General *Greaves* appeared for the prosecution, and Mr. *Goodman* for the defence in each court of hearing.

Mr. *Goodman* in support of the appeal contended that in order to convict the appellant of the charge laid against him by the revenue officer two things had to be established. 1—That the cigars were liable to forfeiture for one of the reasons set out in section 123 of the Trade Act, and 2—That even if the goods were liable to forfeiture that they come into the hands or possession knowingly. It was true that under section 141 the goods having been found on the premises of appellant the onus lay on him to prove that they had been lawfully permitted after duty paid, and it must be presumed conclusively in the present case that duty had not been paid and that the goods were liable to forfeiture. But because they were liable to forfeiture and because they were found in appellant's possession it did not follow that he should be convicted. Before he could be convicted under the Act it must be established not alone that the goods were liable to forfeiture, but that at the time appellant received them he did so "knowingly," that was to say that he knew at the time they were liable to forfeiture. And the learned counsel relied upon the case of the *Attorney General v. Hurel*, xi. M. W. 585 and *Reg. v. Sleep*, 30 L. I. In the last mentioned case the Act distinctly stated that anyone in whose possession government stores were found bearing the mark of the

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broad arrow should be liable to conviction unless he proved how he became possessed of the property, but the court for Crown Cases reserved held that although the goods were found in defendant's possession bearing the mark of the broad arrow he could not be convicted unless it was shown that he knew at the time he received them that they were marked with the broad arrow.

The *Solicitor General* contended that the point involved was a very brief one, and it simply was whether the goods came into the possession of the appellant "knowingly," that is, that they came to his hands he then knowing that they were goods liable to duty. According to the true construction of the Act it did not signify whether at the time appellant received the goods he knew or did not know that they were goods liable to forfeiture. If they were liable to forfeiture as a matter of fact, the Act cast upon appellant the burden of showing they were not so, then upon its being shown that they came into the actual possession of the appellant and not into his constructive possession by the hands of his servant, then the appellant was liable. The learned counsel cited and relied upon the case *ex parte Ransley* 2. D. & R. 151.

HIS HONOUR said that he would at once deliver judgment in this case, as he saw no reason for taking time in order to put it in writing. The question involved was no doubt beset with some difficulty which Mr. *Goodman* had made apparent by his argument, by the ground he had taken up and by the cases with which he had fortified his argument. The difficulty was found in the fact that it was a very old and settled principle that there could be no crime unless there was the intention to commit crime, and if one was charged with a criminal offence it must be shown that he committed it knowingly. A good illustration of that doctrine was supplied by the case of *Reg. v. Sleep* where the court refused to uphold the conviction although the goods found in the possession of the defendant were marked with the broad arrow, because it had not been shown by direct evidence or by unavoidable inference from the evidence adduced that at the time defendant received the goods he knew they were marked with the broad arrow. This was a clear principle of criminal law. But it had been distinctly held that a prosecution under the customs or excise laws was not a criminal proceeding. It was true said the court in the *Attorney General v. Siddon* that such a prosecution was penal, but not criminal. One Judge there said, I consider this not a criminal proceeding but a civil proceeding to recover a debt due to the crown for breach of the revenue laws. In that case the trader who was prosecuted to recover a penalty for harbouring and concealing tobacco liable to duty, was far away from the premises and it was his servant who without his master's actual knowledge received the goods. But the court held that, "where a trader harbours and conceals" smuggled goods, he is liable in penalties for the illegal act of "a servant done in the conduct of the business, with a view to" protect the smuggled goods, though the master be absent "at the time, and the act be done by the servant upon the exigency

"of the occasion, when the goods are discovered." The learned counsel for the appellant in the case now before the court had argued that the word "knowingly" must be held to be susceptible of the construction he put upon it, or that the word in the connection in which it was used in the clause would be absolutely senseless, because if a man received a thing he must of course know that he had it. The answer to that was that *Siddon's* case had shown that the possession of the servant was the possession of the master although the latter might not know as a matter of fact that he was "possessed" of the goods.

Now it seemed to him (the Chief Justice) that the word "knowingly" was introduced into the local Trade Act to get rid of the construction in *Siddon's* case, and to make a trader liable only when he actually knew of the goods being in his possession. Mr. *Arnold* in his book dealing with offences brought before Justices of the Peace refers to the construction to be put in some cases upon the words "wilfully" or "knowingly" occurring in revenue acts. "In some instances," he says, "it is apparently the intention of the legislature to make a distinction between cases in which, in order to constitute an offence, an act must be done 'wilfully or knowingly,' i.e., with the personal knowledge of the party charged." The section of the Trade Act under which this complaint was brought deals entirely with offences actually committed by the individual charged and it seemed to the court that *ex parte Ransley* was in point. There a trader was convicted by Justices for knowingly harbouring foreign Geneva which was run goods and liable to duty. The evidence was that the goods were concealed in the absence of the trader who was charged and the conviction was quashed by the Queen's Bench. The words of the statute were "In case any person shall knowingly harbour keep, or conceal, or shall knowingly permit or suffer, shall forfeit, &c." Counsel for the accused admitted that two things had to be proved, 1. That the accused knowingly harboured or concealed the goods, and 2, that the goods were liable to excise duty. On the 2nd point Lord *Tenterden* interposed the remark that the Act put upon the accused the onus of proving that the excise duty was paid. In the present case there is a similar provision in the Trade Act and therefore that the cigars were run goods and liable to duty was conclusively established. Then the other point arose, did the appellant have actual personal knowledge of the possession of the prohibited goods. In *Ransley's* case the court quashed the conviction on the ground "that the mere naked fact of the spirits being found in the defendant's house during his absence, cannot be considered as conclusive evidence of knowledge to support a conviction on this statute." In the present case the evidence at the hearing proved that the appellant had actual personal knowledge of the receipt of the cigars, and the Court of Appeal so found as a matter of fact, although it is true they held that at the time he so received them he did not know that they had not been legally permitted. The last mentioned point in the opinion of the court did not affect the issue. The issue was whether appellant knowingly

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received them, *i.e.*, whether he had actual personal knowledge of the receipt. If so they knowingly came into his possession and the offence was proved. The decision of the court below was confirmed without costs.

BREWSTER v. CLARKE.

(*In Error, Friday, November 10th 1893.*)

HIS HONOUR SIR CONRAD REEVES, Kt., C.J.)

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IN this case a complaint was laid before Mr. acting police magistrate *Sinckler* by *S. E. Brewster*, Inspector of Health for the parish of St. Michael, against *Jas. E. Clarke*, Shopkeeper, Nelson Street, Bridgetown, under section 20 of "The Public Health Act, 1891,"—"that the said defendant occupying premises in Nelson Street, City of Bridgetown, did on the 9th August 1893, keep five hogs on his premises aforesaid."

The acting police magistrate on the evidence of the complainant came to the conclusion that no case was made out against the defendant, and dismissed the complaint. Against this decision the complainant appealed to the Assistant Court of Appeal, and the majority of judges of that court, after taking additional evidence, confirmed the decision of the acting magistrate. Thereupon the complainant appealed to the Court of Error. Following are the reasons for the decision of the Assistant Court of Appeal:—

REASONS.

In section 20 of "The Public Health Act, 1891," it is enacted,—“It shall not be lawful for any person to keep any “pig * * in the city of Bridgetown * * and any person offending “herein shall for every offence forfeit a sum not exceeding fifty “shillings nor less than ten shillings for every pig * * so kept.”

This section of the new Consolidated Act is taken from section 1 of Act 220 vol. 1. The preamble of this Act states that,—“it having been found that there are numerous accumulations “of filth in Bridgetown in consequence of the great number of “pigs kept in the town and the Board of Health having given “it as their opinion that the keeping of these animals should “not be permitted in the town the interference of the legislature “has become necessary,” &c.

The defendant is charged that on the 9th August 1893, he did keep five pigs on his premises in Nelson Street, Bridgetown.

The material facts as found by us from the evidence adduced are briefly these.

Between 9 and 10 o'clock on the morning of August 9th the defendant bought four pigs from a man called *Wiggins* and at about 10 o'clock he bought one pig from a man called *Waith* and he turned these pigs loose into an inclosed yard at the back of his premises in Nelson Street. At 11 o'clock a.m. the com-

plainant inspected the premises and found the five pigs running about the yard. He says: "the yard was not in such a dirty state as would have caused me to report him."

Before 12 noon the defendant sent the five pigs to a pig-depôt which he had in Dayrell's Road, Christ Church.

As regards the proof of the purchase of the four pigs from *Wiggins*, we may say that it was stated that *Wiggins* was present at the magistrate's court as a witness for the defendant, but was not examined as the magistrate did not call upon the defendant for a defence. The clerk of the Assistant Court of Appeal did not at first summon him as his name was not on the proceedings sent up, but the defendant before the day of hearing made an application to the court for the issue of a summons to *Wiggins*, and this was granted. *Wiggins* did not attend on the day of hearing, and the court took no steps to enforce the summons as they believed the evidence of *Hinkson* to the effect that he had bought the four pigs from *Wiggins* on the morning of August 9th.

These five pigs were thus on the defendant's premises in Bridgetown between two and three hours on August 9th, and it is clear beyond a doubt from the evidence that it was the defendant's intention during the whole of this period to send on the pigs to Dayrells' Road that day.

Did the Legislature have in mind for punishment a case like this when they spoke of "accumulations of filth in Bridgetown in consequence of the great number of pigs kept in the town?"

When a penalty was imposed in respect of every pig kept in the city of Bridgetown, was it not intended by the Legislature that that pig must habitually be within the limits of that town? It appears to us that in cases of this sort it is difficult to draw a hard and fast line and to say that the fact of the pigs being in transit is of itself in every case a good or bad defence.

If the pigs are kept an unnecessarily long time within the limits of the city while in transit there would in all probability be a conviction. If a man kept what was virtually a pig-sty in Bridgetown he would in all probability be convicted, although he proved that the pigs which happened to be found on the premises had only been there a comparatively short time and were not there with the intention of being permanently kept there. But is every person living in Bridgetown who buys a sucking pig in the morning and keep it, say, from 6 a.m. until it is time to kill it for his dinner, say 2 p.m., to be punished because a health officer happens to inspect his premises in the interim? Is a person who buys a little pig in Bridgetown and puts it into his trap or cart which is left at a livery stable for a few hours until such person drives out of town to his residence in the country to be fined for keeping a pig in Bridgetown? This, however, would be a case for conviction, if it were never a defence to the charge of keeping a pig in Bridgetown to prove that the pig was in transit.

It cannot be urged that by holding in this case that the defendant is not guilty we are increasing the risk of the accumulations of pigs' filth in Bridgetown, for under the bye-laws the defendant could be punished if his yard was dirty.

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With regard to the meaning to be assigned to the word "keep" we would refer to *Biggs v. Mitchell*, 31, L. J. M. C. 163, cited in *Maxwell on Statutes*, p. 295.

(Sgd.) W. K. CHANDLER.
 (Sgd.) N. F. BRIGGS.

MR. JUSTICE KNIGHT'S REASONS.

In this case a complaint was laid before Mr. acting police magistrate *Sinckler* by the Inspector of Health for the parish of St. Michael against one *James F. Clarke* under section 20 of "The Public Health Act, 1891," "that the said defendant, occupying premises in Nelson Street, city of Bridgetown, did on the 9th August 1893, keep 5 hogs on his premises aforesaid."

The police magistrate on the evidence of the complainant came to the conclusion that no case had been made out against the defendant and dismissed the complaint, being apparently of the opinion that the fact of hogs being detained on the defendant's premises for sometime before being sent away to the defendant's pig-sty in the country was not a "keeping" within the meaning of the Act.

From this view I entirely dissent. The section of the Act under which this complaint is brought is a literal transcript of the enacting portion of section 1 of the Act No. 220 in vol. 1 of the unconsolidated laws of Barbados. In the preamble of that Act it is stated that the great number of pigs kept in Bridgetown had led to numerous accumulations of filth, and in view of the then approaching cholera it was deemed necessary that the legislature should interfere and make the keeping of pigs in town a penal offence. That Act having been put upon the Statute Book with the express object of promoting the sanitary condition of the town, its provisions should in my opinion be so interpreted as to give effect to what was clearly the intention of the legislature in enacting it.

The evidence taken before the police magistrate in support of the complaint was supplemented by additional evidence taken before this court on behalf of the defendant, the police magistrate having thought it unnecessary to call upon the defendant for any defence.

From the evidence before this court it is perfectly clear that the defendant's premises in Nelson Street in Barbados served him as a sort of pig depôt where pigs were continually detained or kept at the defendant's convenience until they were sent away to the defendant's pig-sty in the country. The Inspector of Health, Mr. *Brewster*, tells us that complaints were made to him "by people living in the same street of defendant's keeping pigs" and both himself and the witness *Belgrave* tell us that they saw pigs on the defendant's premises on more than one occasion. The defendant's servant *Hinkson* tells us that as agent for the defendant it is his custom to "buy pigs at all hours," which are "kept" or detained at the defendant's premises in Nelson Street until it is convenient to send them away.

In my opinion this would constitute a "keeping" contrary to the sanitary policy (if I may use the expression) of the Public Health Act.

But I come now to consider more particularly the specific complaint brought against the defendant, and which was dismissed by the magistrate. In that complaint the defendant is charged under "The Public Health Act, 1891," that he did on 9th August 1893, keep five hogs on his premises in the City of Bridgetown. Supposing that the word "keep" ought to be interpreted as, in my opinion, the legislature intended it to be interpreted, there is no dispute on the part of the defendant as to the averments of that complaint. They are proved even on the testimony of the witnesses put in on behalf of the defendant up to the very hilt.

The witness *Waith* tells us he sold a pig to the defendant on 9th August at 10 o'clock in the morning and turned it loose in his yard and that at that time he saw other pigs also loose in the defendant's yard.

As to the exact number of those pigs (and this is important in view of the penalty) the witness *Hinkson* a confidential servant of the defendant, tells us that he, as agent for the defendant bought that pig from the witness *Waith* that morning and that he had earlier on that very morning bought four other pigs from one *Wiggins*; and he says there were five pigs on the defendant's premises in Nelson Street that on 9th August when witness *Brewster* came up, which was the number he (*Brewster*) also deposed to having seen on the defendant's premises that day. According to the evidence of the witness *Thornhill* the defendant sent a telephonic message to him (*Thornhill*) at a quarter to 12 in consequence of which he (*Thornhill*) sent to defendant's premises in Nelson Street for the five pigs and that the pigs reached his (*Thornhill's*) place about half-past 12 o'clock that day. So that we have the defendant through his witness telling us that he had on his premises in Bridgetown on 9th August five hogs for the space of two or three hours.

But the magistrate was evidently of opinion that this detention of five hogs for 2 or 3 hours on the defendant's premises was not a "keeping" within the meaning of the Act.

According to the wording of the statute (section 20 of "The Public Health Act") the essence of the offence is keeping pigs in the city of Bridgetown. The Legislature has not thought fit to limit the period for which the detention of pigs in Bridgetown shall constitute such "keeping." The words of the Act are simply "it shall not be lawful for any person to keep any pig" &c. Now, among other meanings the word "keep" means "to detain or to hold in custody," and it is not denied that five pigs were detained or held in custody for a period of two or three hours on the defendant's premises on the 9th August this year.

Supposing the view taken by the police magistrate to be the correct view; what would be its practical effect if every householder in Bridgetown acted upon it? Mark: the two or three hours during which the detention of pigs in the city accor-

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ding to this view does not contravene the provisions of the Act may be any two or three hours out of the twentyfour of any day. So that any one of the numerous householders of Bridgetown would be at liberty to keep several pigs on their premises for any two or three hours night or day; and so during the twenty-four hours of every day there might be hundreds of pig-sties kept in the city clearly contrary to the very object of "The Public Health Act."

Reference has been made to the case of *Biggs, Appt., v. Mitchell, Resp.*; reported in 31 L. J., M.C., p. 163, as to the meaning of the word "keep;" but in that case the court seemed rather to have been concerned in explaining the meaning of the word "have" as associated respectively with the words "keep" and "convey" than explaining the word "keep." Besides, the judges in that case seem to have been influenced in their decision by the necessity, as they say, of their being some "halting place" for gunpowder in transition. No such necessity exists in the case now before the court, as the Legislature has made provision in the way of sheds in the public market for animals to be kept intended for slaughter.

Further, in the case of *Foster v. Diphuys Casson State Company* reported in 18 Q. B. D., 428, Lord Coleridge at page 432, criticises adversely the decision in *Biggs v. Mitchell*.

There was a case decided in the Queen's Bench Division on appeal on June 26 this year which, however, was not cited before the court, which seems to me directly in point. I have only a note of the case in "The Justice of the Peace" for July 8th 1893. The case is that of *Steers v. Manton*. In that case an Inspector of Nuisances charged the defendant with keeping swine within 50 yards of a dwelling house in a borough, contrary to the bye-laws. The defendant, it seems, carried on business in a place outside of the town and removed pigs to his place in town where he kept them for some hours until the Railway Company sent for them. The Justices held that pigs brought on order for sale in the morning to his premises in the town was not a keeping of them there within the meaning of the bye-law. The Queen's Bench Division, on appeal, held that the Justices were wrong.

For these reasons I am of opinion that the police magistrate was wrong in dismissing this complaint, and that the defendant ought to be convicted for keeping five hogs in Bridgetown on the 9th August 1893, and a fine of from ten to fifty shillings imposed in respect of each of such five hogs so kept.

(Sgd.) J. GITTENS KNIGHT.

To-day the case came on for hearing before His Honour the CHIEF JUSTICE in the Court of Error.

Mr. Solicitor General *Greaves*, who appeared on behalf of the appellant, submitted first, that section 20 of "The Public Health Act 1891," was a re-enactment of section 1 of "The Public Health Act, 1851," and the preamble to the Act of 1851 was to the effect that "whereas experience has proved that in

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"all places where cleanliness has not been attended to the ravages of cholera have been the most extensive and fatal; and whereas it having been found that there are numerous accumulations of filth in Bridgetown in consequence of the great number of pigs kept in the town, and the Board of Health having given it as their opinion that the keeping of these animals should not be permitted in the town." The object of the Act, therefore, as gathered from the preamble, was to prevent the keeping of pigs in the town and not to prevent the keeping only when filth was the result. Secondly, the word "keep" was capable of two constructions. It may mean that any keeping, even a single act of keeping, was prohibited, and he submitted that that was the true construction of the word in this case. In *Steers v. Manton*, a case decided in the court of Queen's Bench by Justices *Day* and *Wright*, on the 26th June 1893, and reported in 57 Justice of the Peace, 421, the facts were as follows:—

"S. an inspector of nuisances, charged M., a pig-dealer with keeping swine within 50 yards of a dwelling-house in the borough of Bedford contrary to the bye-laws. M. carried on a large business in another place outside the town, and as the railway company did not send trollies to take away pigs sold there, M. removed the pigs to his place within the town, where he kept them for some hours till the railway company sent for them. The justices held that pigs brought on order for sale in the morning to his premises in the town was not a keeping of them there within the meaning of the bye-law." The court of Queen's Bench held that the justices were wrong. *Shelly v. Bethel* L. R. 12, Q. B. D. 11, was also in point. The other construction was that "keep" meant an "habitual keeping." [See *Marks v. Benjamin*, 5, M. & W. 565] and the evidence in the case abundantly supported the contention that there was an habitual keeping by respondent. In *Biggs v. Mitchell* 31 L.J. M.C., 163, it was held that a licensed carman having a quantity of gunpowder, in excess of the statutory quantity, in a shed only for purposes of transit, and only so long as was necessary to load and unload, it was not a "keeping" within the meaning of the statute. *Crompton J.* in this case said "the mere halting in London to send from one railway to another when it is necessary that there should be a halting in some place or another is not a keeping." * * * "The gunpowder may be kept for a reasonable time while the cart or carriage is loading or unloading. * * There should be a keeping as a dealer or for an unreasonable time to constitute a keeping." In the present case there was a keeping as a dealer, because respondent was a "dealer." There was also a keeping for an "unreasonable" time because the pigs were kept several hours, certainly very much longer than was necessary to unload and reload them and send them off. If the act of the respondent was not a keeping, then every one in town could do what he did, and the very mischief the Act was passed to prevent would happen.

Mr. G. A. Goodman, who appeared on behalf of the respondent and in support of the decision of the lower court, submitted that the facts found by the majority of the judges of the Assis-

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tant Court of Appeal were, as appeared from their joint judgment (1) that defendant resided and carried on business at Nelson Street in the City of Bridgetown; (2) that five pigs were bought by him at his place of business about 10 o'clock on the morning of the 9th August last; (3) that when defendant bought the pigs he intended to send them to his pig dépôt in Dayrells' Road on the same day, and (4) that the defendant did send the pigs to Dayrells' Road about 12 o'clock of that day. The question for the court to determine was this—"Do these facts constitute a keeping of the 5 pigs in the city of Bridgetown"? He contended that they did not because the pigs were in Nelson Street merely for transit—merely for the purpose of being conveyed to a point outside of the city. To keep pigs within the meaning of the Act meant to have pigs in your possession for an indefinite period and did not mean to have them in your possession for a short interval of time preparatory to their being dispatched to their destination, or to their being killed. In other words, "to keep pigs" did not mean to have them in your possession for a mere temporary purpose [vide *Biggs vs. Mitchell* 31 L.J. M.C. 163]. If "to keep pigs" were construed to mean to have pigs in your possession, no matter for what time or for what purpose, then the consequences of such an interpretation would be serious and unreasonable. One consequence would be that no householder in the City, be he butcher or otherwise, could purchase a pig at his house for the purpose of being sent to the country or to the slaughter house in the Public Market to be slaughtered, or for the purpose of being killed at his home. It could not be imagined that the legislature intended that interpretation to be put on "keep." "If the enactment is unfortunately expressed in such language," as *L. J. Brett* said in the *R. L. Alstone*, 8 P.D., 9, "that it leaves it quite as much open with regard to its form of expression to the one interpretation as the other, the question arises—'what is to be done?'" We must try and get at the meaning of what was intended by considering the consequences of either construction. And if it appeared that one of these consequences would do injustice and the other would avoid that injustice, "it is the bounden duty of the court," as Lord *Cairns* said in *Hill v. East and West India Dock Coy.*, 9 App. Cases, 456, "to adopt the first of these constructions."

Mr. Solicitor General *Greaves*, having replied.

HIS HONOUR said: The point involved in this appeal, to my mind is in no way a complicated one, nor do I think that there is any difficulty in construing the law. I see no reason, therefore, for taking time to put my decision in writing. I will give it at once and, as concisely as I can, the grounds on which I decide. The information was brought in the magisterial court, by the Inspector of Health for Bridgetown, under section 20 of "The Public Health Act, 1891," which enacts that "it shall not be lawful for any person to keep any pig, hog, or other description of swine in the city of Bridgetown or in any other of the towns of this Island." This is a literal transcript of the first enactment on the subject, which was passed on 19th

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February, 1851, and the preamble states that cholera was prevailing in a neighbouring colony, and that it was advisable to take every precaution against its introduction here, and it having been found that there were accumulations of filth in Bridgetown from the keeping of pigs, it was most necessary, in the interests of sanitation, to put down this practice, experience having proved that in all places where cleanliness had not been attended to, the ravages of this malignant disease were most extensive and fatal. That preamble distinctly defines the policy of the Act, which is to put down a practice, that of keeping pigs, which has a tendency to cause accumulations of filth. Now, it is to be observed that the Act does not make it unlawful to have pigs in possession: the offence consists, not in the having of pigs in possession, but in the "keeping" of pigs; and the words "have" and "keep" are not synonymous. Keeping involves the idea of doing something which is more or less habitual as contradistinguished from doing something occasionally. In the case of *Marks v. Benjamin*, 5 M. & W., 565, proceedings were brought to recover a penalty of £100 under a statute of Geo. ii. for keeping an unlicensed house for public dancing. It was a jury case and the question was, whether there was a keeping within the meaning of the Act. It was proved in evidence that the defendant, who was a publican, had let his rooms to a dancing master, who had admitted persons by ticket. Lord Abinger said there was no case for the jury as there was no "keeping" of an unlicensed house for dancing. The full court was moved for a new trial upon the ground of misdirection by the Judge. A new trial was ordered. In doing this the court said that to support the information it must be shown that the room was kept for the purpose prohibited, and Baron Park remarked that there must be something like an habitual keeping of it, which, however, need not be at stated intervals. Further, the learned Baron distinctly held that the question was entirely one of evidence and in the case before the court ought to have been left with the jury to determine. "There would be a difficulty," he continued "in making the owner of a private house liable, "because that is kept for the purpose of occupation, whereas a "public house is kept for entertainment and a much less number of instances may be sufficient to render the owner liable "for keeping it for the purposes mentioned in the statute." All this seems to me very clear in its bearing upon the present case. Two things are established by the ruling of the court. First, that to constitute a "keeping" the practice must be more or less "habitual;" and second, that whether the thing complained of is habitual or not, is in every case a matter of evidence. In the case now before me in appeal, if the Inspector of Health and his assistant had proved nothing beyond the fact that on the 9th August they found even five pigs upon the premises of respondent I should not have thought that a keeping within the meaning of the Act was proved, even though the respondent be a person who slaughters pigs, or, at any rate, buys pigs for the purposes of his trade, because the Act is penal and must be strictly construed, and the Inspector of Nuisances has to prove

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in every case, not only that a person charged has pigs in his possession, but that he is keeping them within the meaning of the Act. What is the evidence in the present case as I find it in the proceedings before me? Mr. *Brewster* said in the magisterial court: "I visited the premises of the defendant on the 9th August and found five pigs in the yard. Defendant told me that he had bought the five pigs on that day, and that he intended to send them away that very evening. That he frequently bought pigs daily, but sent them away in the evening. In fact, it was his daily custom to buy pigs and send them away in the evening." The witness also said, "defendant keeps a meat-shop and before 9th August I inspected his premises and found pigs there." In the Court of Appeal Mr. *Brewster* said, "complaints were made to me by people living in the same street of defendant's keeping pigs." To this last mentioned statement I attach no judicial value because it is not evidence and should not have been taken by the court below. Obviously, Mr. *Brewster* should have produced these persons in court. But he continued in the court of Appeal:—"The first occasion on which I found pigs on defendant's premises was two or three weeks before 9th August; there were several pigs." Mr. *Belgrave*, the sub-inspector, deposed in the magisterial court that on two occasions he found pigs on defendant's premises: "on the first occasion I found three pigs in the yard. A few days after I again went to the same premises and found three or four pigs in the same yard. This was between 10 and 11 in the morning. Defendant said he had bought them for butchering." This, so far, is the evidence in support of the information, and, looking at the ruling of Baron *Park* in the case I have cited, and seeing that respondent kept a butcher's business, even the evidence in the magisterial court establishes a *prima facie* case against respondent by raising the presumption that the practice was more or less habitual and therefore a keeping of pigs within the meaning of the Act. How does he rebut this presumption? He calls a person named *Hinkson* at the Court of Appeal, who says, "I cut and sell meat for respondent at his premises in Nelson Street. I always buy pigs for him on the premises. I send them up to his pen in Dayrells' Road when I buy them. I buy pigs at all hours. On the 9th of August I did not send them away immediately after the purchase because the cart broke down, but, as a rule, we send a pig off when we buy it." The witness said in reply to the *Solicitor General*:—"I remember Mr. *Belgrave* (sub-inspector) coming two or three times and there were pigs there when he came." And the witness finally swears "that no pigs ever remain on the premises from one day until the next." A witness named *Thornhill* is also called by respondent and swears "that he lives in Dayrells' Road, Christ Church, where he keeps a sty for defendant's use." He adds, "defendant sends pigs from his place in Nelson Street. Sometimes 2, sometimes 3, 4, or 5 are sent by my carts. The pigs usually come between 12 and 1, and not later than half-past one." And he adds this important testimony: "if a pig is bought by defendant after 1:30, I don't know what becomes of it during the

rest of the day." * * * "Lately defendant has been sending pigs only once or twice a week." Such is the evidence, and the question is, whether or not it is a fair and legitimate inference from that evidence that the defendant habitually kept pigs on his premises. First of all, it is proved in support of the complaint that respondent, being a dealer in butchers' meat, is found on two occasions at least, when his premises are inspected, in possession of several pigs,—4 or 5. His own witness *Hinkson* says he buys pigs for him on the premises at all hours of the day, although he states positively that they are not kept there from one day to another, but are sent off to *Thornhill's* in *Dayrells'* road. But when *Thornhill* comes in he deposes that no pigs are sent to him after 1.30, and that latterly pigs were sent to him only once or twice a week. Now, the majority of the Court of Appeal say in their judgment that if the respondent was to be convicted then a person who buys a little pig in *Bridgetown* and puts it in his trap, where it is kept two or three hours, until he drives down to the country where he lives, would be equally liable. But I say that is not the present case. The present case is one in which a dealer in pigs is found more than once with pigs in his possession and when he comes to rebut the *prima facie* case against him, his witnesses prove that he buys pigs daily, and their evidence makes it very doubtful whether the pigs so bought are sent away even every night. The Court of Appeal refer to the case of *Biggs v. Mitchell*, 31 L.J., M.C., 163. But what was that case? A carman and carrier was found in possession of a large quantity of gunpowder in a warehouse, and he was charged with "keeping" the gunpowder contrary to the Act. The Lord Mayor, who tried the case and convicted the defendant, stated in the case for the Queen's Bench, that he was satisfied upon the evidence that the carman was only temporarily in possession of the powder, which was in transit and would be sent on in a couple of hours. The Court of Queen's Bench held that it was only a temporary possession of the powder and not a keeping. That to constitute a keeping within the meaning of the Act it must be shown either that the defendant was in possession of the powder for the purposes of his trade, or for an unreasonable time. And the court declined to determine what was a reasonable or unreasonable time to detain the powder. That, they said, in effect, must depend upon the circumstances of each case. I say the same thing in the present case. It is not a question of how many hours the pigs are kept on premises in town before they are sent away. A man might have a pig upon his premises for three or four hours, and that, upon the evidence and all the circumstances, might not be a keeping within the meaning of the Act. Another man might daily, or three or four times a week, have 3 or 4 pigs upon his premises for only a couple of hours. Yet, that, under all the circumstances proved in evidence, might well constitute a keeping within the meaning of the Act. The question in every case must be whether the practice of keeping is more or less habitual, and whether the tendency of the practice is not to accumulate filth in the town; because whether

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there is filth or not accumulated, if the tendency of the practice is to produce the mischief which the law was passed to suppress, that would be sufficient. *Per Grove J., The Banbury Sanitary Board v. Page*, 51 L.J., M.C. 21. The test is this. Manifestly whatever the respondent might lawfully do every other householder living in the same street might also do; and indeed, every other householder in Bridgetown. And if every householder in Bridgetown was, like the respondent, to buy pigs daily and at all hours of the day and keep them upon his premises for two or three hours every day, even supposing they were not kept there all day long and during the night, is it not manifest that that is a practice which would lead to numerous accumulations of filth by the keeping of pigs—the very mischief which the Act was passed to suppress? It is laid down that in construing a remedial statute such as is the one under which the present information is brought, it is the duty of the judges “to put such a construction upon the statute as shall suppress the mischief, and advance the remedy—to suppress subtle inventions and evasions for continuing the mischief *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act *pro bono publico*.” I think that the fair and true inference from the evidence all taken together, is that the respondent did keep pigs contrary to the Act, and I have no course left but to reverse the decision of the court below and order the respondent to pay a fine of 10 shillings for each of the five pigs found on his premises on the 9th August. It is no fault of the respondent that this case was taken to the Assistant Court of Appeal and has come before this court, so he must only pay the costs of the magisterial court.



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S. who was indebted to T on a bond, was appointed executor of T's will. S proved the will and acted in the trusts thereof, and regularly debited himself with the amount of the debt and interest. On his death some years after, S devised his real estate in Barbados to trustees for sale, subject to the payment of his debts, with a direction that the crops should be consigned to a firm of B. H. & Co. of Liverpool, until the debts due by him to them should be paid in manner therein described. One of the executors of S's will confessed judgment to the assignees in bankruptcy of B. H. & Co. for the amount due to that firm; and subsequently the assignees instituted a creditor's suit in the Court of Chancery of Barbados. On exceptions to the Master's report, ranking the debts:—*Held*, (affirming the decision of Clarke, V.C.), (1) that the appointment of S as executor did not take away its priority as a specialty debt from his debt to T, and (2) that the statute 5 Geo. II. c. 7 (s. 4) in making real estate in the West Indies applicable to the payment of debts generally was not intended to interfere with the legal priority of debts, but to secure to specialty creditors the same priority against real estate that they always

have had against personal estate; and that a testator could not disappoint the rule of law in this respect.

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2.—*Plantations in Barbados—Powers of management given to trustee and executor—Advances by merchant—Misappropriation by executor—Liability of merchant to see to application of advances—Power of executor to bind future crops—Consignees' lien—Statute of Frauds must be pleaded.*] Plantations were devised to executors in trust to manage and apply the profits in payment of the expenses of executing the trusts and in other specified ways, and also to raise in aid of the personal estate not specifically bequeathed so much money as should be required to satisfy funeral expenses and debts and the liens and charges on the plantations until the debts and liens should be paid, and subject thereto upon certain ultimate trusts.

D, a merchant, who had been in the habit of making advances to the testator against consignments of portions of the crops of sugar made on his plantations, continued under a special agreement, but not in writing, to make to the only executor who proved the will similar advances for the cultivation of the plantations and for the payment of debts and annuities and other the purposes of the will

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case and dismissed the appeal with costs. WILSON V. CALLENDER—J.C. 19.

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Butchers' Act 1890 s. 30]. By s. 4 of the Act of 25th April 1888 (s. 30 of "The Market and Butchers' Act 1890") it is provided that "within the city of Bridgetown and within one mile from the limits thereof no person shall expose for sale, and no person who exercises the calling of selling butchers' meat shall sell, butchers' meat obtained from any animal slaughtered at any place other than in the slaughter house of the public market or in a place licensed for the slaughtering of animals as hereinafter provided."

B, a butcher residing in the parish of Christ Church, went into a shop within a mile from the limits of Bridgetown and placed on the counter a wicker basket covered with a cloth. A policeman who happened to be present saw through the interstices that the basket contained butchers' meat, and he uncovered the basket and found the contents to be mutton. The mutton had been obtained from an animal slaughtered in Christ Church. *Held* by Reeves C. J. (reversing the decision of the Assistant Court of Appeal) that the word "expose" is used in the Act in its ordinary meaning and that there was no exposure of meat for sale within the meaning of the Act. *BRATHWAITE v. TAYLOR*.....142

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11, 23.] Where certain streams of water had been abstracted from the appellant's property by a water company acting under the Water Supply Act 1886:—*Held* by the Judicial Committee (reversing the decision of the Court of Common Pleas) that the compensation due to the appellant included the value of his proprietary interest therein, and was not limited to the amount of pecuniary benefits obtained by past user thereof in disregard of possible benefits in the future. *TRENT-STOUGHTON v. BARBADOS WATER SUPPLY COMPANY*.....J.C. 59

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Costs.—*Taxation of on appeal to Privy Council—Mortgage.*] Costs, under the circumstances of the case, allowed to the appellant, a mortgagee of slaves in Barbados; and directed to be raised together with the mortgage money by a sale of the property in case of non-payment by the respondents. *HENRY v. BYAE* J.C. 2.

2—Special leave to appeal—Amount below appealable value.....53.
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Criminal Law.—*Larceny—Growing Crops—Acts Nos. 441 and 523* ["*The Larceny Act 1868*" and "*The Police Magistrates Act 1891*" s. 8 (1)]—*Particeps Criminis—Summary Procedure—Charges of stealing and receiving in the same complaint.* L. & C. being employed to cut sour grass on the land of W, took some of the grass they had cut into a field of canes belonging to B who was standing at

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a distance of about 100 feet and saw L. & C. take the grass into his canes but neither said nor did anything. B was charged in a complaint lodged by W before the Magistrate with stealing and receiving, and was convicted under the Petty Larceny Act of stealing sour grass; which conviction was upheld by the majority of the Assistant Court of Appeal. *Held* by Reeves C.J. in the Court of Error, (1) that there was no evidence on the face of the proceedings to convict B of larceny; for the fact of a man's being present when a felony is committed does not *per se* constitute him *particeps criminis*; (2). that he ought to have been charged under Act No. 441 which referred to growing crops, and not under Act No. 523 which dealt with the larceny of goods and chattels; (3) that B having been charged with both stealing and receiving, it was the duty of the Magistrate to call upon the complainant to elect upon which of the charges he would proceed. **BRATHWAITE v. WEEKES.....141**

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Error, Court of—*Damages*—*Power to reduce on appeal*]. On an appeal by the defendant in an action in which damages have been awarded, the Court of Error has power to reduce such damages. So *held* by PACKER C.J. in the Court of Error, following precedents of CLARKE C.J. and of his own. **OVERTON v. CALLENDAR...109.**
2.—Incompleteness of proceedings sent up by the Assistant Court of Appeal—*Postponement of hearing*.] Where it appears by a statement on the face of the proceedings sent up by the Assistant Court of Appeal to the Court of Error on an appeal from the former to the latter

court, that those proceedings are incomplete, the Court of Error has no power to compel the Assistant Court of Appeal to supplement them: nor will the Court of Error, after the appeal has been pending for several months, postpone the hearing for the purpose of enabling one of the parties to endeavour to get the proceedings made more complete. **BELGRAVE v. HUNT.....146.**

3.—Notice of appeal from Assistant Court of Appeal—Writing not necessary.. 121.
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2.—Powers of management of estates—Misappropriation of advances —Power to bind future crops 21.
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Fire Insurance.—*Option of Insurers to terminate Policy on giving Notice—Construction of Condition—Practice—Costs.*] A policy of insurance against fire was issued subject to the conditions, first, that it should not apply to any portion of the subject of insurance which should by reason of some act done after its dates without the consent of the insurers be exposed to increased risk of fire, or removed to a building or place other than that described in the policy; second, that the insurers might terminate it by notice if "by reason of such change or from any other cause whatever," they should desire to do so, refunding to the insured a rateable proportion of the premium for the unexpired time of the policy:—*Held*, that the insurers had, by force of this condition,

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the option of terminating the policy at will.

Costs of successful appeal not ordered, being below the appealable value, and special leave having been given on the ground that its decision was of general importance to insurance offices like that of the present appellant. **THE SUN FIRE OFFICE v. HART**.....J.C. 53.

Health—See **PUBLIC HEALTH**.

Highways—*Obstruction*—*Packages of Peas and Rice*—“*Rubbish*”—*Ejusdem Generis Canon of Construction*—“*The Highways Act, 1891*,” s. 23.] By s. 23 of “*The Highways Act 1891*.” “If any person shall wilfully place timber, stone, trash, manure, soil, ashes, rubbish, or other matter or thing whatsoever upon the highway, the person so offending shall incur a penalty”
Held by Reeves C.J. in the Court of Error (affirming the decision of the Assistant Court of Appeal) that the section applies only to things of the same nature with those enumerated, which are classed as constituting “rubbish;” and therefore only things that are worthless and refuse matter, and not packages of merchantable peas and rice come within the true meaning of the general words “or other matter or thing whatsoever.”
LAWRENCE v. FIELD.....174

Insolvency.—*Insolvent Debtors’ Act, No. 234 of 1846*—*Adjudication of Bankruptcy in England*—*Certificate*—12 & 13 Vic. c. 106 s. 200—*Fraud*—*Jurisdiction of Colonial Court to commit insolvent notwithstanding English certificate.*] Although an adjudication in bankruptcy, followed by a certificate of discharge in England under the bankrupt laws, has the effect of barring any debt which the bankrupt may have contracted in any part of the world, and of putting an end to any claim, such proceedings do not supersede the authority of the court

in Barbados to inquire into frauds and offences committed against the law of insolvent debtors in that island in a proceeding had there previous to the adjudication in bankruptcy in England, the insolvent having again placed himself within the jurisdiction of that court.

G, a trader in Barbados, having left the island in embarrassed and suspicious circumstances, was under the Act No. 234 of 1846 adjudicated an insolvent, and his estate and effects administered under the Act. He afterwards went to England and was adjudicated a bankrupt for a debt contracted in England, and obtained a certificate of conformity under 12 and 13 Vic. c. 106 s. 200, discharging him from all debts due by him when he became a bankrupt. G returned to Barbados, and the Court of Common Pleas, at the instance of the opposing creditors, sentenced him to eighteen months’ imprisonment for fraud committed against the provisions of the Act:—*Held* (affirming the order of Clarke C. J.) that the Court of Common Pleas of Barbados having acquired jurisdiction in the first instance in the matter of the insolvency, retained such jurisdiction, so as to render G on his return amenable to that court for fraudulent acts committed by him; and the sentence passed on him confirmed. **GILL v. BARRON** J.C. 36.

2.—*Contracting debts without reasonable expectation of paying*—*Living beyond means*—*Penal Clauses*—*Extenuating circumstances*—*Insolvent Act 1846 ss. 12, 20* [*Bankruptcy Act 1892 s. 27, 3 (b), & s. 106.*]—Amongst the allegations against an insolvent were the following:—

(1) That he, being in insolvent circumstances, contracted considerable debts..... not having at the several times when the same were so contracted any reasonable or probable expectation of paying the same.

(2) That he lived extravagantly and

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beyond his proper means during the time he exercised his trade.

* * * * *

(4) That he did not keep such books of account as enabled the Official Assignee to obtain a correct and full knowledge of his affairs.

* * * * *

(7) That he contracted a debt to the amount of £10,183.....fraudulently and by means of a breach of trust.

On the facts, *Held* by Clarke C. J. that (1) and (2) had been proved; whereas (4) and (7) had failed to be proved; but that with regard to (2), looking to the position the insolvent held among the mercantile body, the C. J. would not have felt justified in putting the penal provisions of the Act into execution against him on this score alone. With regard to (1), the C. J., looking to all the circumstances of the case, to the general character of the insolvent, to the failure in proof of the charges of fraud, and though last, not least, to the information derived from the books, inflicted a sentence of six months' imprisonment. *Re* PATRICK KILKELLY.....94.

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Landlord and Tenant—*Notice to quit—Holding over—Second Notice to quit—Waiver—Summary Ejectment—Act No. 206* ["*Landlord and Tenant Act 1891*" s. 34 et seq.].—*Evidence—Judicial Notice of proceedings in same Court—Order Book—Entry of decision.*]

P was an annual tenant of G, and on 28th December 1883, G served on P notice to quit on 1st July 1884. P held over, and G took proceedings

against him under Act No. 206, which resulted in the dismissal of the complaint without prejudice on 21st July 1884. In January 1885, G again took proceedings under the same Act, and the Magistrate again dismissed the complaint without prejudice, on the ground of informality in the proceedings, which decision was affirmed by the Assistant Court of Appeal on 1st June 1885.

On 26th December 1885, G served a notice on P to quit at the expiration of six months; but P held over, and G served on him the notice required by the abovementioned Act (Form No. 1 of the Schedule) and took proceedings thereunder to have him ejected. The notice, though signed, did not have the addition of "owner" as contained in the form; and the complaint in Form No. 2 of the Schedule was not signed by either G or the Magistrate, nor was the date filled in. On the ground of these informalities, as well as on the ground that P was not on the 26th December 1885 a tenant of G, the Assistant Court of Appeal reversed the decision of the Magistrate. For the facts which showed the latter ground, viz, that on the 26th December 1885 P was not a tenant of G, the Court relied on its own records, taking judicial notice of the former proceedings between the same parties:—*Held* by Packer, C. J. in the Court of Error, that the notice of 28th December 1883 was a subsisting legal notice, and that therefore the tenancy was determined on 30th June 1884; that the second notice to quit could operate as a waiver of the first and create a new tenancy only with the consent, express or implied, of both parties; that merely holding over was not evidence of a renewed tenancy to bind a tenant who had received an absolute and unconditional notice to quit at a given date; and therefore G could fall back upon his first notice and take proceedings to recover the land.

Quære: With regard to the facts dis

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closed by former proceedings, instead of taking judicial notice thereof, it would have been more regular if the Magistrate and the Clerk of the Assistant Court of Appeal had been subpoenaed to produce the proceedings.

The entry by a Magistrate of his decision in the Order Book in accordance with the Justices of the Peace Procedure Act, [Police Magistrates' Act 1891 s. 34.] cannot be contradicted by a subsequent note made from memory on the back of a duplicate of the Order Book. *GITTENS v. POUNDER*. *GITTENS v. ALLEYNE*.....110.

Larceny—Jurisdiction—Goods over the value of 20s.....170.

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See **COLONIES**.

Limitations, Statute of—*Real Estate Act 1853* s.s. 3, 16. [*"Limitation and Prescription Act 1891,"* s.s. 4, 16.]—*Ejectment*—*Husband's interest in Wife's real estate taken in Execution*—*Wife's estate rendered future*—*Time of accruer of Wife's right of action.*]

S, a woman, being seised in fee of certain land, married C in 1855. In 1864 C's interest in the land was taken in execution under a judgment recovered against him by R, and was purchased by R from the Provost Marshal; but R did not complete the purchase, and the land was re-attached by the Provost Marshal in 1872. R, however, continued in occupation of the land until his death; after which his son, the appellant, continued to occupy it until action brought. C died in 1890. *Held* by Reeves, C.J., in the Court of Error (affirming the decision of the Assistant Court of Appeal in its original jurisdiction) that the attachment by the Provost Marshal of the husband's interest converted the wife's interest into a future estate, that therefore the wife's right of action did not accrue until her husband's

death in 1890, and consequently she was entitled to maintain an action of ejectment. *REID v. BECKLES*...148.

Liquor Licenses—Offences—Act of 6th Nov. 1876 ss. 3, 21 [*"Liquor Licenses Act 1890"* ss. 2, 3 (1)]—*St. Raphael wine—Selling without license—Mens rea*. By s. 21 of the Act of 6th Nov. 1876 (s. 3 (1) of the "*Liquor Licenses Act 1890*") "if any person shall without a license. . . dispose of any. . . wines. . . he shall be liable to a penalty. . ." K, not having a license, sold a pint of St. Raphael wine, and was convicted by a Police Magistrate under the above-mentioned Act. The majority of the Assistant Court of Appeal held that, as the evidence disclosed no fraudulent intention, K could not be convicted, and reversed the decision of the Magistrate. On appeal to the Court of Error, *held* by Reeves C. J., that the selling of wine without a license was absolutely prohibited by the Act, and that the offence being complete upon the doing of the prohibited act, the question of guilty knowledge or intention could not be considered. *BERKELEY v. KNIGHT*.....115.

Magistrate—See **POLICE MAGISTRATE**.

Master and Servant—*Neglect to perform stipulated work—Tenancy incident to service—Notice to quit—Shorter notice than provided by Act—Estoppel—Contract Act 1840* [*Master and Servant Act 1891*]"—*"The Contract Act Amendment Act 1883"* s. 4 [*"Landlord and Tenant Act 1891"* s. 42.] W was a labourer holding land incident to service on P's estate. On 9th March P gave W a four weeks' notice to quit; W continued working on the estate until 6th April, but after that day he ceased to do so. P lodged a complaint against W under the Contract Act 1840 s.] [*Master and Servant Act 1891* s. 4(1) 3

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for having neglected on 7th April and following days to perform his stipulated work, which was dismissed by the Police Magistrate:—*Held* by Reeves C.J. in the Court of Error (reversing the decision of the majority of the Assistant Court of Appeal) that notwithstanding that the notice was a four weeks' instead of a calendar month's notice, as required by the Act, yet P was estopped from alleging that the notice given by himself and accepted by W was legally insufficient, and therefore W was under no liability to work for P after the expiration of the four weeks.

The provision of The Contract Act Amendment Act 1883 s. 4 [Landlord and Tenant Act 1891 s. 42] is imperative, and it is not competent to the parties to override it by mutual agreement. *WHITTAKER v. PARRIS* 154.

Mortgage—See COSTS.

Negligence — *Evidence of—Court of Error—Jurisdiction—Costs*—A tramcar was at 9 p.m. on a certain day proceeding at a trot along the line on a highway which was undergoing repair, when at a certain point it was jerked off the rails by some stones which had got into the groove, with the result that the mules drawing the car collided with C, who was walking on the road and caused damage to her person and property. It was proved that on the previous journey over the same road stones had been found in the grooves of the rails. It was held by the Judge of the Bridgetown Petty Debt Court and by the majority of the Assistant Court of Appeal that there was no evidence of negligence on the part of those in charge of the tramcar:—*Held* by Reeves C.J. in the Court of Error, that negligence being a question of fact, he had no jurisdiction to entertain the appeal, and therefore could make no order as to costs.

But opinion expressed that there was *prima facie* evidence of negligence on the part of those in charge of the tramcar, inasmuch as with the knowledge they possessed of what had happened on the previous journey, they ought to have proceeded at a very slow pace over those parts of the road where loose stones were lying about. *COBHAM v. BRIDGETOWN TRAMWAYS CO.* 182.

New Trial—When ordered by Court of Error.....137
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Notice of Dishonour—Bill of Exchange drawn in Barbados on London.....62.
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Notice to Quit—Second notice—Waiver.....110.
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Office—Question of title to.....89
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Petty Debt Court.—*Jurisdiction—Question of Title to any corporeal or incorporeal hereditaments—Action for assault and false imprisonment—Act of 19th August 1864 s. 2. [Petty Debt Act 1890. s. 24]—Duty of Petty Debt Court Judge to give reasons for his decision.* A became the owner of a piece of land in 1844, and on his deathbed he authorised B to look after it for his children. The land had been rented by A to R, and after A's death R continued to pay the rent to B. In 1865 D, conceiving himself entitled to the land, authorised J to take possession of it and plant it for his (D's) benefit, J. entered on the land and cut down a tree, and when about to carry it off was arrested by W, a police officer, acting at the request of B. J, having brought an action for assault and false imprisonment against W:—*Held* by Clarke C. J. in the Court of Error (reversing the decision of the Assistant

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Court of Appeal and restoring that of the Magistrate exercising Petty Debt jurisdiction) that as a question of disputed title to land arose on the evidence in the case, the Magistrate had no jurisdiction to entertain it.

The Magistrate's decision being simply, "Dismissed for want of jurisdiction—No costs":—*Held* it was his duty to give his reasons for his decision, according to the official instructions to that effect. **WILLIAMS v. DUESBURY**.....102.
2.—*Plaint—Nature of*.....137.
See PRACTICE. 3.

Pleadings—None in Assistant Court of Appeal (Original Jurisdiction) 121.
See PRACTICE. 2.
2.—None in Petty Debt Courts..137
See PRACTICE. 3.

Police Magistrate.—*Question of Title to an office.—Clerk to Commissioners of Highways — Magistrate's jurisdiction ousted*].

S, as clerk to the Commissioners of Highways for the parish of Christ Church, complained before the Police Magistrate against E for not having made a return of lands horses and carriages in accordance with the Highways Act. At the hearing E objected to the Magistrate's jurisdiction on the ground that he (E) as Parochial Treasurer of the parish was entitled to the office of Clerk to the Commissioners of Highways, and the question of title to the office was then pending in the Superior Court. *Held* by the Assistant Court of Appeal (reversing the decision of the Police Magistrate) that a bonâ fide question of title having been raised, the jurisdiction of the Magistrate was ousted.

When an objection is raised to the jurisdiction of an inferior court, the presiding officer is authorised to go so far into the case as to ascertain whether the objection is bonâ fide and not merely colourable i.e. put forward to stop the proceedings and to

defeat justice. **SPRINGER v. EVELYN**.....89.

2.—*Jurisdiction—Larceny — Goods over the value of twenty shillings and not exceeding forty shillings—"Police Magistrate's Act, 1891" s. 17.]* L was charged before a Police Magistrate with the larceny of a wheel and axle of the value of 40s., and the Magistrate recorded on the face of the proceedings the consent of L to the case being tried; but no evidence as to the value of the articles was given at the trial. On appeal to the Assistant Court of Appeal, the value of the wheel alone was proved to be 40s., and L was convicted. *Held* by Reeves C.J. in the Court of Error (reversing the decision of the Assistant Court of Appeal) that although the Magistrate had put to the prisoner the statutory question, and obtained his consent to the case being tried summarily, and had recorded that consent on the proceedings, yet, inasmuch as the value of the goods had not been proved, the course prescribed by the statute to originate jurisdiction had not been followed, and therefore the Magistrate had no jurisdiction to try the case. *Held* further, that proving the value of the goods before the Assistant Court of Appeal could not cure the defect of want of jurisdiction, for if the Magistrate had no jurisdiction the higher court could have none. **LYTE v. BROWNE**.....170.

Practice.—*Appeal to Court of Error —Assistant Court of Appeal (original jurisdiction)—Declining jurisdiction—No appeal—Detinue—Plaint disclosing jurisdiction — Evidence showing value of goods greater than £50—Jurisdiction ousted.]* In an action of detinue claiming the restoration of the goods or the sum of £50, the majority of the Assistant Court of Appeal in its original jurisdiction struck out the cause on the ground that inasmuch as the value of the goods was not stated, the plaint did not disclose jurisdiction

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On appeal to the Court of Error:—*Held* by Reeves C. J. [following *E v. Cook* (*Court of Common Pleas* 1882)] that declining jurisdiction was not a decision by hearing and determining within the meaning of the "Appeals from the Assistant Court of Appeal Act 1886" s. 2. subs. 2. [Assistant Court of Appeal Act 1891 s. 50 sub s. 2] and therefore the Court of Error had no power to entertain the appeal.

Held, however, that the plaint did disclose jurisdiction; and if the court below had heard and determined the case, *Bishop v. Smith* (*Ante* p. 121) would have applied.

If, on going into the evidence in such a case, it turns out that the value of the goods exceeds £50, the jurisdiction of the court is ousted.

CALLENDER v MAYERS.....134.

2.—Assistant Court of Appeal (original jurisdiction)—Trespass to goods—Claim of £50 damages—Jurisdiction—Plaint—Value of the goods—Form G of Rules of Court—Effect of non-compliance with forms—Question of jurisdiction—Striking out cause—Notice of appeal to Court of Error—Writing—Order xxii, Rule 3—Act of 27th Feb, 1883 ss. 22, 29, 31. [*Assistant Court of Appeal Act 1891* ss. 27, 53, 54, et sqq.]—Nature of plaint and procedure in the Assistant Court of Appeal]. B sued S in the Assistant Court of Appeal (original jurisdiction) for £50 damages for trespass to goods. The goods were enumerated on the face of the plaint, but neither the value of each item nor the collective value of the whole was set out.—*Held* by Reeves C. J. in the Court of Error, (reversing the decision of the Assistant Court of Appeal) that it is not necessary in order to confer jurisdiction on that court that the value of the goods should be set out either on the face of the plaint or in the shape of particulars of demand in accordance with Form G in division 20 of the schedule of the Rules of Court, but that, the damages claimed on the face

of the plaint being laid at £50 and no more, jurisdiction was shown. *Held* also, that the forms in the Rules and Orders of the Court are given only as examples; and that it is optional with the parties to comply with Form G, since what is contained in it is matter of evidence.

The court below, while holding that they had no jurisdiction, entered a verdict for the defendants:—*Held* that their proper course under the circumstances was to strike out the cause.

Held further, that notice of appeal to the Court of Error from the Assistant Court of Appeal in its original jurisdiction is not required to be in writing.

There are no pleadings at all in proceedings in the Assistant Court of Appeal in its original jurisdiction. Suitors have only to state their cause of action in the briefest manner without any particular technicality, only taking care to make the party sued and the court which is to adjudicate understand the nature of the injury sustained, and the particulars of the debt or demand, and to show that there is jurisdiction in the court to try and determine the plaint. BISHOP v. SMITH.....12.

3. — Petty Debt Court — No "pleadings" — Plaint — Particulars — Insufficiency — New Trial—Petty Debt Act 1869. s.s. 8, 18. [*Petty Debt Act 1890* ss. 26, 31]—Rule 20.] M brought an action for false imprisonment against L in the Bridgetown Petty Debt Court. The plaint was framed in accordance with the form of declaration set forth in *Bullen and Leake* on Pleading p. 335 (2nd ed.) By way of preliminary objection defendant's counsel urged that the plaint was bad for want of certainty, the date not being given, nor the circumstances of the alleged tortious act set forth with such certainty as would enable defendant to plead *res judicata* in another court; and that such conditions prejudiced the defendant's being

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prepared to prove an *alibi* or his setting up any statute of limitations :—

Held by Reeves C. J. in the Court of Error (affirming the decision of the Assistant Court of Appeal) that there are no pleadings at all in the Petty Debt Courts, and therefore objections cannot be raised in the form of demurrers or special pleas; that it is only necessary to state the cause of action in the briefest possible way, it being sufficient if the plaint discloses enough to show a legal wrong for which damages are recoverable. If no particulars, or insufficient particulars, of demand are filed, it is the duty of the judge at the hearing, on the request of the defendant, to adjourn the hearing and make an order on the plaintiff to furnish particulars or further particulars on such terms as in the discretion of the Judge may seem fit; and if the Judge refuse to make such order, the Court of Error will (if defendant's request be noted on the record) order a new trial.

The objection that Rule 20 of the Rules of the Petty Debt Courts has not been complied with cannot be raised in the Court of Error, unless it appears on the proceedings that defendant has in the court below moved for an order for particulars. *LEACOCK v. MOE*.....137.

Priority—Specialty Debt—Debtor appointed executor of creditor... ..3.

See ADMINISTRATION. 1.

2.—Judgment confessed by Executor.....3.

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Privy Council—Judicial Committee—Appeal—Point not raised in the Court below.....3.

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2.—Appealable value.....19

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Public Health—“*Keeping*” pigs in a town—“*Public Health Act 1891*,” s. 20.]

By s. 20 of the “*Public Health Act 1891*,” it is provided that

“it shall not be lawful for any person to keep any pig, hog, or other description of swine in the city of Bridgetown or in any other of the towns in this Island.....”

C, a dealer in butchers' meat, was in the habit of buying pigs daily or almost daily, and allowing them to remain for a few hours at his premises in Nelson Street, Bridgetown, after which they were sent to a sty outside the limits of the town:

Held by Reeves C.J. in the Court of Error (reversing the decision of the majority of the Assistant Court of Appeal) that to constitute a “keeping” within the meaning of the section the practice must be shown to be more or less habitual and to have a tendency to accumulate filth, that the number of hours during which the pigs remain on the premises is not material, and that therefore on the facts C was guilty of the act prohibited by the statute. *BREWSTER v. CLARKE*.....188

Revenue—Customs—*Goods liable to forfeiture—Coming into the possession of a person “knowingly”—Trade Act 1891 s. 123 (1) and s. 134 (3).*]

By s. 123 sub. s. (1) of the Trade Act 1891, goods liable to the payment of duties which shall be unshipped before due entry (except where such unshipment is authorised) and warrant granted for unshipping the same are rendered liable to forfeiture; and by s. 134 subs. (3) of the same Act every person who shall assist in the unshipping of goods liable to forfeiture or “into whose hands or possession the same shall knowingly come,” shall for each such offence be liable to a certain penalty.

E received certain cigars which were liable to the payment of duty and had been unshipped before due entry and warrant granted; and he had actual personal knowledge of such receipt. *Held* by Reeves C. J. in the Court of Error (affirming the decision of the Assistant Court, of

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Appeal) that the test of the commission of the offence was knowledge of the receipt of the goods and not knowledge of their liability to forfeiture, and that E had been rightly convicted. *EDGHILL V. BYNOE*...184.
 2—Liquor License.....115.
See LIQUOR LICENSES.

Title—Question of.....89, 102.
See POLICE MAGISTRATE. 1.
PETTY DEBT COURT. 2.

Trespass—“Wanton, annoying, or malicious”—*Act of 1878* [*Petty Trespass Act 1891 s. 3.*]*—Colour or Pretence of Right.*

On a charge under the Petty Trespass Act 1878 of having “unlawfully entered on lands in possession of the complainant after having been forbidden to do so,” a reasonable pretence or claim of right, even though not well-founded in law, takes the case out of the meaning and intention of the statute, and furnishes a complete defence. So *held* by Reeves, C.J., in the Court of Error (affirming the decision of the majority of the Assistant Court of Appeal). *HAYNES V. DASH*...125.

Waterworks—Powers — *Bridge-town Water Works Company—Supply*

to plantation in the rural districts—Recovery of rate in a summary manner as in the case of servants’ wages—Statute—Preamble—Implied repeal—Act of 4th October, 1870—Water Supply Act 1886, s.s. 108, 109, 110, 136.

A company taking advantage of the “Act to encourage the laying down of Waterworks in the several parishes of this Island” passed on 4th October 1870, was not restricted to Cole’s cave as a source of supply; nor was it necessary for such a company, in order to obtain the benefits of the Act, to lay down new works.

The Act of 1870 was not impliedly repealed by the Water Supply Act, 1886; and any other company might, under the Act of 1870, have carried on operations side by side with the Water Supply Company so far as plantations and other similar places were concerned, provided it did not interfere with the streams or lands which the Water Supply Company were authorised to purchase or abstract. So *held* by Reeves, C.J., in the Court of Error, affirming substantially the decision of the Assistant Court of Appeal. *GITTENS V. BRIDGETOWN WATERWORKS COMPANY*.....196.

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Ex. J.M.
12/12/05

